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IN THE

Supreme Court of the United States

October Term, 1943

Nos. 38 and 39

COLGATE-PALMOLIVE-PEET COMPANY,
Petitioner,
vs.
UNITED STATES OF AMERICA.

BRIEF FOR PETITIONER.

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BRIEF FOR PETITIONER.

The opinion of the District Court is reported in 37 F. Supp. 794. The opinion of the Third Circuit Court of Appeals, the opinion on Rehearing modifying the original opinion and as itself modified by the order of November 11, 1942, and the dissenting opinion of Judge MARIS on Rehearing are reported in 130 F. (2d) 913.

Statement of Basis of Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 28 U. S. C. A. 347, c. 229, 43 Stat. 938.

Statement of the Case.

These are suits to recover taxes paid under protest under Section 602½ of the Revenue Act of 1934, c. 277, 48 Stat. 763, the pertinent part of which reads as follows:

"Sec. 602½. Processing Tax on Certain Oils.

(a) There is hereby imposed upon *the first domestic processing* of coconut oil, sesame oil, palm oil,

> palm-kernal (sic) oil, or sunflower oil, or of any combination or mixture containing a substantial quantity of any one or more of such oils with respect to any of which oils there has been no previous first domestic processing, a tax of 3 cents per pound, to be paid by the processor. * * * For the purposes of this section the term 'first domestic processing' means *the first use in the United States*, in the manufacture or production of an article intended for sale, of the article with respect to which the tax is imposed * * *."[1]

The Act was passed and the tax became effective May 10, 1934. On August 17, 1934, the Commissioner of Internal Revenue issued Regulations 48 under Section 602½. Subdivision (l) of Article 1 of the Regulations interprets the phrase "the first domestic processing" as used in Section 602½ as follows:

> "(l) First domestic processing means the first use in the United States *on or after the effective date of the Act*. At all times in these regulations, the term processing or first domestic processing will be deemed to be synonymous with 'use' or 'first use in the United States *on or after* the effective date,' respectively, and will include the meanings implied in the latter terms by subdivision (k) above."

The words "on or after the effective date of the Act" are not in the Statute. They are an interpolation, and the question in these cases involves the right of the Commissioner of Internal Revenue to make that interpolation.

All of the facts are stipulated (Rec. pp. 8-18, 19-28). For present purposes they may be summarized as follows:

Petitioner, a Delaware corporation, with its principal office in Jersey City, New Jersey, is and was engaged in the

[1] Where italics are used in quotations, it will be understood that the emphasis is ours unless otherwise noted.

business of manufacturing and selling soaps and other products in the manufacture of which it processed palm kernel oil, sunflower oil, palm oil and coconut oil. All of the coconut oil involved herein was of Philippine origin or was made wholly from materials grown or produced in the Philippine Islands.

On May 10, 1934, the day on which Section 602½ became effective, petitioner had on hand oils specified in that section which had already received from one to four separate and distinct processings within the United States. These processings were refining, dehydrating, deodorizing and bleaching and all are recognized in Regulations 48 (and by the Court below) as domestic processings within the meaning of Section 602½. However, such oils were subjected to a further processing after the effective date of the tax and pursuant to the above regulation and interpolation the tax was levied on such further processing after May 10, 1934, although the processing so taxed was in each case either the second, third, fourth or fifth processing in the United States. It is the taxes so levied which petitioner seeks to recover.

The first suit (No. 38) involves taxes in the amount of $1,476,507.81 paid by petitioner with respect to the further processing during the period May 10, 1934-April 30, 1935, inclusive, of oils which had already so received one to four domestic processings prior to the effective date of the statute. Similarly, the second suit (No. 39) involves $885,874.56 of taxes paid by petitioner with respect to the further processing during the period May 1, 1935-January 31, 1937, inclusive, of similar processed forms of oils which likewise had already received one to four domestic processings prior to the effective date of the statute. Both suits were brought pursuant to Paragraph 20 of Section 24 of the Judicial Code, as amended February 24, 1925 (43 Stat. 972, Ch. 309, 28 U. S. C. A. 41 (20)).

The suits were consolidated for trial upon Stipulations of Facts. The District Court rendered its opinion on March 20, 1941 (Rec. pp. 1-7), and held that the Act should be construed to mean that the tax was to be levied on "the first domestic processing occurring *after the section became law*" (Rec. p. 5) and that, consequently, the taxes had been properly levied and collected (notwithstanding that in point of fact the processings so taxed were the second, third, fourth or fifth domestic processings). On April 23, 1941, judgments were entered dismissing the complaints (Rec. pp. 1, 18) and on July 19, 1941, appeals were taken to the Circuit Court of Appeals for the Third Circuit.

On March 31, 1942, the Circuit Court of Appeals filed its unanimous opinion sustaining the District Court (Rec. pp. 29-37) and judgment of affirmance was entered. Thereupon, on appellant's petition, a rehearing was had and on August 21, 1942, the Circuit Court of Appeals filed a *majority* opinion (Rec. pp. 42-44), again sustaining the District Court and judgment of affirmance was again entered. Judge MARIS, who had concurred in the original opinion and affirmance, dissented and filed a separate opinion (Rec. pp. 44-46). A Petition for a Second Rehearing was entertained but denied by order entered November 11, 1942, which order materially modified the majority Opinion on Rehearing by deleting the greater portion of it (Rec. p. 50). This Court denied a Petition for Writs of Certiorari on May 24, 1943. Thereafter, on June 1, 1943 the Circuit Court of Appeals for the Seventh Circuit rendered a decision in the case of *Durkee Famous Foods, Inc.* v. *Harrison*, 136 F. (2d) 303, in conflict with the decision of the Court below, and this Court, upon a Petition for Rehearing, entered an order on June 14, 1943 granting the Writs.

The question upon which this conflict of Circuit Courts of Appeals arose—now before this Court for final determi-

nation—is whether a second, third, fourth or fifth domestic processing may constitute "the first domestic processing" within the meaning of the Act and may be the taxable event.

Specification of Assigned Errors.

1. The Court below erred in holding that the tax imposed by Section 602½ upon "the first domestic processing" applied to the processings involved in these suits which were in fact second, third, fourth or fifth domestic processings.

2. The Court below erred in holding that Regulations 48 issued by the Commissioner of Internal Revenue correctly interpret the taxing phrase "the first domestic processing" in Section 602½ of the Revenue Act of 1934 (specifically defined therein as "*the first use in the United States*, in the manufacture or production of an article intended for sale") as meaning "the first use in the United States *on and after the effective date of the Act.*"

3. The Court below erred in holding that the rule of prospective operation of statutes requires an interpretation of the word "first" as meaning first after the effective date of the Act and justifies the interpolation of the words above italicized, whereas the proper application of the rule "should merely result in imposing the tax upon those processings *within the statutory definition* which actually took place after the effective date of the Act, not in modifying the definition so as to impose the tax upon transactions which upon the normal application of the rule would have been exempt," as stated by Judge MARIS in his dissenting opinion (Rec. p. 45).

4. The Court below erred in holding that Section 702(a) of the Revenue Act of 1936, c. 690, 49 Stat. 1648, page 1742,

amending Section 602½, shows that "it was the intention of Congress to tax the designated oils or combinations not previously taxed under the section, whether processed prior to the passage of the 1934 Act or not,'" thus in effect holding that every "first domestic processing" is a taxable processing, when the express language of the amendment recognizes in exemption clauses (1) and (2) that not every first domestic processing is taxable but that there would be previous first domestic processings taxed under this section (*i. e.*, those occurring after May 10, 1934) and previous first domestic processings which were untaxed (*i. e.*, those occurring before May 10, 1934).

5. The Court below erred in failing to apply the principle that doubts as to the construction of tax statutes should be resolved in favor of the taxpayer and against the Government.

Summary of Argument.

At the outset petitioner wishes to make it entirely clear that it *is not claiming the benefit of any exemption*, express or implied, under the statute. The question is not what Congress has exempted from the operation of the statute but what Congress has *taxed* under it.

This taxing statute must be applied so as to give to the words employed their usual and normal meaning and the Courts may not by implication extend or enlarge its scope beyond the clear import of the language used. This principle requires that the words "the first domestic processing" should be construed to mean the first or earliest use in fact in the United States in the manufacture of an article intended for sale. The tax is imposed on *the first* domestic processing and does not apply to a second, third, fourth or fifth processing.

The derivation from the Agricultural Adjustment Act, c. 25, 48 Stat. 31, of the provisions of Section 602½ as a whole and of the phrase "the first domestic processing" in particular, and the purpose of Congress to supplement that Act by Section 602½, show that that phrase was intended to have the same meaning in Section 602½ as in the Agricultural Adjustment Act, viz., the first domestic processing in fact and not a second or subsequent processing and that no processing tax was to attach if the first processing had been completed before the effective date of the tax.

The legislative history of Section 602½ shows clearly that the specific purpose of Congress was *to restrict future imports* and thus protect the American farmers' products against further importation into the United States of the specified oils by levying a tax on their first actual use within the United States. The tax contemplated was upon the first use after entry and there was no thought of taxing any subsequent processing or use. A tax on oils already in process of conversion in the United States into finished products would not further the purpose of the tax.

The 1936 amendment of Section 602½ does not show that oils domestically processed before May 10, 1934 were to be taxed, but shows on the contrary that the amendment recognizes that such oils were not subject to the tax.

The rule of prospective operation of taxing statutes simply means that the tax will not be retroactively applied to transactions occurring prior to the effective date of the tax unless a contrary intent is shown; in the cases at bar it means that "the first domestic processing" is taxable only when such processing occurs on or after May 10, 1934. No contrary intent is shown here but all of the indicia from which one normally judges the intent of Congress indicate clearly that Congress intended to tax only the earliest proc-

essing in the United States in fact and did not intend to tax any second or subsequent processing.

Regulations 48 were not made applicable to Section 602½ by paragraph (f) thereof, as was apparently held by the Court below; they were not in existence when Section 602½ was passed.

The inference that Congress intended to tax the first domestic processing after the effective date of the Act which the Circuit Court of Appeals for the Second Circuit in *Loose-Wiles Biscuit Co.* v. *Rasquin*, 95 F. (2d) 438, draws from the absence of an express provision that such processing is not to be taxed, is untenable because it assumes as a premise that in the absence of such provision such processing would be taxed, *i. e.*, it assumes as a premise that "first" means "first after the effective date of the Act," which is the thing to be proved.

The redundancy supposed by that Court to reside in the original act as interpreted by the taxpayer is not to be weighed against the substantial evidence that Congress intended that "first" should mean "earliest," or against the inexplicable redundancy which the Court's interpretation creates in the 1936 Amendment.

The purpose, as viewed by that Court, of the limitation in Section 602½ with respect to the taxation of mixtures, of avoiding double taxation, does not render the Treasury construction of "first domestic processing" any more reasonable than the taxpayer's because either construction effectuates that purpose.

If there be any doubt as to the meaning of the statutory language, such doubt should be resolved in favor of the taxpayer and against the Government.

ARGUMENT.

POINT I.

Taxing statutes should be applied so as to give to the words employed their usual and normal meaning and the scope of such statutes should not be extended or enlarged by implication beyond the clear import of the language used. This principle requires that the words "the first domestic processing" be construed to mean the first or earliest use in fact in the United States.

These oils commonly undergo successive processings in the course of manufacture of finished articles, and in clear language Section 602½ levies the tax upon "the *first* domestic processing" which is defined to mean "*the first use in the United States* in the manufacture or production of an article intended for sale." In the cases at bar, the tax was actually collected upon second, third, fourth or fifth domestic processings. There is no dispute with respect to the meaning of the words "domestic processing" or "use in the United States." The Government concedes that the oils in question had already been domestically processed (used in the United States), before May 10, 1934, the effective date of the tax. The dispute arises with respect to the meaning of "the first."

"First" is defined in Funk & Wagnalls New Standard Dictionary, 1942, as meaning "Prior to all others in time or occurrence; earliest, as the first snow of the season." It is indisputable that the ordinary or normal meaning of "the first use in the United States in the manufacture or production of an article intended for sale" is the earliest use in the United States in manufacture—that use in the

United States in manufacture which precedes all others in point of time. "Earliest" is precisely the meaning which the Government gave to the word "first" in construing the tax similarly levied upon "the first domestic processing" under the Agricultural Adjustment Act, as will be presently shown. No other meaning can be ascribed to the statutory language without reading into the statute something which Congress did not put there. The Treasury definition differs from the statutory definition in two respects. The Treasury definition leaves out the words in the statutory definition here italicized: "first use * * * *in the manufacture or production of an article intended for sale,*" and puts in their place the italicized words in the phrase "first use *on or after the effective date of the Act.*"

The opinion of the Court below recognized that "if we take the literal meaning of the word 'first', we must concede that it means in advance of all others, the earliest" (Rec. p. 35)—in this case the earliest use in manufacture in the United States. However, the majority of the Court did not give "first" its literal meaning, which is its usual meaning, for the assigned reason, *inter alia*, that "Obviously Congress could have made its intention very plain by adding a very few words to the phrase 'first domestic processing' such as 'in point of time,' if that body had in mind the end which the appellant contends it had" (Rec. p. 35). But that is what the phrase normally means. Why should Congress add redundant words merely to make it plain that "first" means first? If, however, "first" had been intended to mean "first after the effective date of the tax" then, to be sure, Congress should have said so.[1]

[1] In *Shwab* v. *Doyle*, 258 U. S. 529, the Court said (p. 536): "If Congress, however, had the purpose assigned by the Commissioner, it should have declared it; when it had that purpose it did declare it."

But Congress did not say so. On the contrary Congress defined "the first domestic processing" to mean "the *first* use in the United States *in the manufacture or production* of an article intended for sale." It is the first use in manufacture—not the first use after the effective date of the Act—that Congress taxed. These oils commonly undergo successive processings in the course of manufacture of finished articles and the first such processing after the oils reached this country is the processing taxed. This is further evidenced by the explanatory reports which accompanied the introduction of the original bill and the Conference Committee revision. House Report No. 704 explains the tax as follows:

> "This section imposes a processing tax on coconut oil and sesame oil. 'Processing' is defined as *the first use* of the oil *in the manufacture or production* of an article for sale."

Conference Report No. 1385 explains that "the first domestic processing" is "defined as *the first use in commercial manufacture or production.*"

When Congress intended to convey the thought of "after the effective date of this act" it did so. In the very subdivision of Section 602½ here under consideration, Congress twice used the phrase "after the date of the enactment of this Act,"[1] which it so conspicuously did not use in defining "first domestic processing" and which the Government, and the Court below, have written into the statutory definition. In Section 602 (App. p. 75) of the same Act levying an import duty upon certain imported whale, fish and marine-animal oils which had been previously in-

[1] See Section 602½, Subdiv. (a) Clause (C). (App. p. 76).

cluded by the Senate with the oils here in question[1] Congress specifically provided:

> "The tax on the articles described in this paragraph shall apply only with respect to the importation of such articles *after the date of the enactment of the Revenue Act of 1934* * * *."

If Congress had intended to tax "the first domestic processing after the effective date of the Act," it would have used plain and unmistakable language to express its intent, as it did in Section 602.

Section 602, as enacted, took the form of an amendment to the Revenue Act of 1932 and imposed an import duty. Obviously an import duty must be levied and collected when the foreign merchandise passes through the custom-house and, as a practical matter, cannot be applied retrospectively to catch foreign merchandise which has already cleared the custom-house prior to the effective date of the duty. Nevertheless, to clearly express its intent, Congress inserted the phrase "after the date of the enactment of the Revenue Act of 1934." When Congress took such an abundance of caution to state that the import duty applied only to importations after the date of enactment of the 1934 Act—when that obviously *was not necessary*— is it to be supposed that Congress would have failed to state that "first domestic processing" was intended to mean first after the effective date of the Act, if that had been its intent—when that obviously *would have been necessary* to make such meaning clear?

The fact that Congress took the trouble to define the phrase "the first domestic processing" gives added weight to the circumstance that it was defined to mean "the first use in the United States" and was not defined to mean "the first use in the United States after the effective date of the

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[1] See Senate Report 558; *infra*, page 48.

Act." Moreover, it will be shown that the taxing language of Section 602½ was taken from the Agricultural Adjustment Act and that it had already been established at the time of the enactment of Section 602½ that the phrase "the first domestic processing" in the Agricultural Adjustment Act meant the earliest in point of time and did not mean the first after the effective date of the tax. If under those circumstances Congress had intended the phrase to have a different meaning in Section 602½, it is even more significant that when Congress defined the phrase in Section 602½ it did not indicate that the phrase now had a new meaning.

We quote briefly from a few of the many cases which enunciate the rule that should be applied.

In *United States* v. *Merriam*, 263 U. S. 179, the Court said (p. 187):

> "• • • *But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used.* If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer."

In *United States* v. *Standard Brewery, Inc.*, 251 U. S. 210, the Court said (pp. 217, 219):

> "Nothing is better settled than that, in the construction of a law, its meaning must first be sought in the language employed. If that be plain, it is the duty of the courts to enforce the law as written, provided it be within the constitutional authority of the legislative body which passed it. • • •
>
> "While entitled to respect, as such decisions [of the Internal Revenue Department] are, they *cannot enlarge the meaning of a statute enacted by Congress.*"

And again in *Thompson* v. *United States*, 246 U. S. 547, the Court lays down the rule as follows (p. 551):

> "The intention of the Congress is to be sought for primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture."

Also, in *United States* v. *Missouri Pacific R. R. Co.*, 278 U. S. 269, the Court said (p. 277):

> "The language of that provision is so clear and its meaning so plain that no difficulty attends its construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. *We are therefore bound by the words employed*, and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. * * * *Construction may not be substituted for legislation.*" (Citing cases.)

In *Old Colony Railroad Company* v. *Commissioner*, 284 U. S. 552, 560, involving the meaning of "interest * * * on its indebtedness" in the Revenue Act of 1921, Mr. Justice ROBERTS, speaking for an undivided Court, applied the rule that

> "the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but exigency of a hard

> case and ingenuity and study of an acute and powerful intellect would discover."

In *Deputy* v. *duPont*, 308 U. S. 488, one of the questions before this Court was whether the disbursements in question constituted "ordinary and necessary expenses paid or incurred." In holding that they did not, this Court said (p. 493):

> "* * * And when it comes to construction of the statutory provision under which the deduction is sought, the general rule that '*popular or received import of words* furnishes *the general rule* for the interpretation of public laws,' Maillard v. Lawrence, 16 How (US) 251, 261, 14 L ed 925, 930, *is applicable.*"

As "first" means "prior to all others in time or occurrence; earliest," to add to the statute the words "on or after the effective date of the Act" is clearly to extend the statute "by implication beyond the clear import of the language used" or, in the words of the *Standard Brewery* case, *supra*, to "enlarge the meaning of a statute enacted by Congress." It certainly cannot be said that the language used, construed as petitioner construes it, does not express "an intention reasonably intelligible and plain"; it "leads to nothing impossible or unreasonable." Thus, in the language of the *Thompson* case, "it must be accepted without modification by resort to construction or conjecture."

POINT II.

The derivation from the Agricultural Adjustment Act of the provisions of Section 602½ as a whole and of the phrase "the first domestic processing" in particular, and the purpose of Congress to supplement that Act by Section 602½ show that the phrase was intended to have the same meaning in Section 602½ as it had under the A. A. A., viz., the first domestic processing in fact and not any second or subsequent processing, and that no processing tax was to attach if the first actual processing had been completed before the effective date of the tax.

(1) Derivation of Language Used in Section 602½.

The same Congress which enacted Section 602½ had at its prior session enacted the original Agricultural Adjustment Act (hereinafter referred to as A. A. A.), 48 Stat. 31, approved May 12, 1933. To provide funds for the benefit payments contemplated in that Act, Congress adopted *an entirely new form of excise tax*, namely: a tax levied upon *"the first domestic processing"* of basic agricultural commodities (Section 9).

It is not questioned that the provisions of Section 602½ were derived substantially and largely verbatim from the provisions relating to the processing tax under A. A. A. including specifically the language levying the tax upon "the first domestic processing." For the Court's convenience, we have quoted in the Appendix (pp. 77-81) in parallel columns, corresponding provisions of the A. A. A., approved May 12, 1933 and of Section 602½, approved May 10, 1934.

The Court below conceded this, saying "We entertain little doubt that the provisions of Section 602½ were derived largely from Section 9(a)" (Rec. p. 32).

(2) Meaning of "The First Domestic Processing" at the Time Section 602½ Was Enacted.

What was the meaning of "the first domestic processing" as used in the A. A. A. from which that phrase was borrowed in enacting Section 602½? A tax levied merely upon "the domestic processing" of the products covered by that Act would have been a multiple tax because those products, like the oils involved in this suit, are for the most part subjected in the normal course to successive processings before they are converted into finished articles of commerce. It was therefore necessary to designate "the *first* domestic processing" as the taxable transaction—the first of any series of processings. This Congress did, as the Treasury Department recognized.

During the first six months following the enactment of the A. A. A., the Treasury Department gave careful consideration to the application of the tax imposed thereby upon "the first domestic processing" and issued three different versions of Article 7, Regulations 81, relating to the time when such tax attaches (App. pp. 88-89); but throughout such changes the Treasury Department consistently recognized that the earliest processing in the United States in point of time, whether occurring before or after the effective date of the Act, was "the first domestic processing" within the meaning of A. A. A. The final form of the Regulation, adopted November 2, 1933 to be effective retroactively to July 9, 1933, reads as follows (T. D. 4403 C. B. XII-2, p. 430):

> "Art. 7. When tax attaches.—The tax is imposed upon *the first domestic processing*, and is measured by the amount of the commodity put into such processing. The tax attaches to a particular quantity of

> the commodity (1) *if it is in process on the effective date, provided the first domestic processing has not been completed prior to that date,* or (2) if the first domestic processing is begun during the period while the tax is in effect, provided it is completed before the termination of the tax. Where the first domestic processing of a particular quantity of the commodity is completed prior to the effective date, but on the effective date such quantity is in secondary processing, it is subject to the tax on floor stocks (see Regulations 82)."

It will be noted that if "the first domestic processing of a particular quantity of the commodity is completed prior to the effective date" *no processing tax attaches to any subsequent processing.*

The Court below recognized that (Rec. p. 32):

> "The Treasury Regulations (Article 7 of Treasury Regulations 81, approved July 12, 1933) and the amendments thereto promulgated by the Treasury Department in connection with Section 9(a) of the Agricultural Adjustment Act bear out the appellant's assertion *that the Treasury Department construed the phrase 'the first domestic processing'* to mean *the first in point of time.*"

The majority of the Court below declined, however, to give the same taxing phrase in Section 602½ the same meaning given to it by the Treasury Department under the A. A. A. though recognizing that if the two taxes "are deemed to be *in pari materia* the two sections should be interpreted similarly." The majority held that the two Acts were not *in pari materia* because Congress also provided in a Supplementary Revenue Provision of the Agricultural Adjustment Act for a floor-stock tax upon commodities already proc-

essed[1] but did not enact a similar floor-stock tax to supplement Section 602½ (Rec. p. 33). But the question whether Section 9 of the A. A. A. levying a processing tax and Section 602½ levying a processing tax in language copied from Section 9 are *in pari materia* is not affected by the circumstance that in Section 16 of the A. A. A. there is also levied a supplementary floor-stock tax. The floor-stock tax may arguably furnish an additional reason for construing the phrase "the first domestic processing" in its normal and usual sense. But the absence of that additional reason certainly gives no ground for construing the phrase otherwise than in its normal and usual sense. The same Congress used the same taxing phrase in two statutes—the second designed to close a "loophole" in the first, as we shall show—and Congress in effect adopted the then administrative interpretation of the phrase "the first domestic processing" in the first Act by defining it in the second Act to mean "the first use in the United States." Surely there could be no stronger case for the application of the principle that the same taxing language in successive Acts should be similarly construed.

Furthermore, as the Seventh Circuit in the *Durkee* case, *supra*, in disagreeing with the reasoning of the Court below, aptly observes (App. to Petition for Rehearing, p. 19):

> "As already shown, Congress was attempting to protect the farmer from competition with imported

[1] A. A. A. contained secondary "Supplementary Revenue Provisions" for (1) a compensatory import tax under Section 15(e) upon the importation into the United States of any article processed or manufactured wholly or in chief value from any basic agricultural commodity upon which the processing tax was then in effect, and (2) a floor-stock tax under Section 16(a) upon any article processed wholly or in chief value from any basic agricultural commodity subject to the processing tax and held for sale at the time the processing tax upon that particular commodity went into effect, with an exception in favor of retailers' stocks sold within 30 days (App. pp. 87, 88).

oils largely from the Philippines. By reason of the Philippine Independence Act, it was precluded from placing an import duty on such oils. It sought to accomplish the same objective by imposing a tax upon the 'first processing,' defined as the 'first use in the United States.' The imposition of the floor tax upon oil already processed would have been no aid in the accomplishment of the desired purpose. The revenue feature of both the Act under consideration and the Agricultural Adjustment Act was purely incidental and not for the benefit of the Federal Government. *In the former, the taxes on coconut oil were to be segregated in the Treasury and paid to the Philippine Islands. In the Agricultural Adjustment Act, the taxes were to be segregated and paid to the American farmer as benefits.* Furthermore, *the effect of the construction* sought by the government as applied to the instant situation *would come close to imposing a floor tax by regulation.* The fact that Congress, after imposing a floor tax in the Agricultural Act, made no such provision in the instant Act, is also a significant circumstance that Congress did not intend that a tax should be imposed upon the designated oils processed prior to the enactment."

Although Congress in Section 602½ borrowed from the Agricultural Adjustment Act the tax on "the first domestic processing," its failure to borrow therefrom the floor-stock tax is significant. This was no unintentional omission. Such a tax was urged by the cotton-seed oil producers at the hearings before the House Ways and Means Committee (Committee on Ways and Means Hearings, Revenue Revisions 1934, p. 600) but no floor-stock tax was included in the Act.

That was a plain indication that Congress did not intend to tax those oils which had been domestically processed prior to May 10, 1934. If Congress had been concerned to tax domestically processed oils on hand on May 10, 1934, it would have heeded the plea for a floor-stock tax such as was provided for in A. A. A. Despite the election not to levy a floor-stock tax, the Commissioner construed Section 602½ so as to tax all such processed oils which petitioner and others had on hand, *thus accomplishing the same practical effect as to those oils as if a floor-stock tax had been enacted.* Are we to assume, despite the intentional omission of a floor-stock tax from Section 602½, that Congress nevertheless intended what is tantamount to a floor-stock tax on those oils but left the effectuation of that intent to the hazard of a new administrative interpretation of "first domestic processing" contrary to the then administrative construction thereof?

The Commissioner has supplied the intentional omission of Congress by an act of administrative construction—an utterly indefensible procedure.

It is submitted that (1) the derivation of the language used in Section 602½, (2) the administrative interpretation of the taxing phrase "the first domestic processing" then in effect, and (3) the adoption of that interpretation by defining said taxing phrase in Section 602½ to mean "the first use in the United States," without adding "after the effective date of the Act," all show that Congress intended to levy the tax upon the first use of the imported oils after they reach the United States, with no thought of taxing any subsequent use.

POINT III.

The legislative history of Section 602½ shows that Congress intended to lay on imported vegetable oils the same processing tax to which the domestic products with which the oils compete were already subject under the Agricultural Adjustment Act—a tax on "the first domestic processing" in fact, not a tax on any subsequent processing.

In none of the other cases decided in favor of the Government has the attention of the Courts been called to the legislative history of Section 602½. The Government's arguments—as well as the arguments in behalf of the taxpayers in those cases—have been predicated upon an erroneous premise that this is an ordinary taxing statute whose primary purpose is to obtain revenue.

We shall show the following in this section of the brief:

1. The occasion for the enactment of Section 602½ was the enactment in the preceding year of the Agricultural Adjustment Act which provided for a tax on "the first domestic processing" of certain domestic agricultural products. Among those products were products which were in competition with the foreign vegetable oils. Protection against those foreign oils had been vainly sought for several years. Under the taxation provided for in A. A. A. those domestic products were at a still further disadvantage against the foreign oils, and the purpose of A. A. A. to restrict production and so raise prices would be frustrated, it was argued, if further tax-free importations of the competing foreign oils were permitted. Those were the considerations which induced the passage of Section 602½. Revenue was not its purpose.

2. The tax levied by that section was imposed in lieu of a duty. It was intended to have the effect of a duty, *i. e., to restrict future importations.* Congress was not concerned to tax domestically processed oils already on hand in this country.[1]

3. Congress effected the protection, now at last recognized as necessary because of the tax provided for in A. A. A., by the very appropriate imposition of the same kind of processing tax upon the foreign oils.

4. The Congressional committee reports show the same motive and the same intent.

1. The reason for the enactment of Section 602½.

All of the oils taxed under the statute are imported oils. For many years prior to the imposition of this tax there was persistent agitation by producers of domestic fats and oils for a protective tariff on these foreign oils. The Court below attributed the enactment of Section 602½ to this "continuous agitation for the protection of domestic farm products from duty-free coconut oil and other competitive vegetable oils" (Rec. p. 34). That was in part the reason but the Court ignored the real point of that history which was this: Not until the domestic products with which these foreign oils competed were made subject to the processing tax provided for in A. A. A. did Congress recognize a need for protection against the foreign oils. That protection it then provided by levying upon the foreign oils the same processing tax to which the domestic products were subject under A. A. A.

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[1] That the tax would fall on such crude oils as might already be in the country when the tax went into effect was merely an inseparable incident of a tax of this nature. The taxation of oils previously imported was no part of the specific Congressional objective, as will abundantly appear.

When the Revenue Act of 1928 was under consideration, efforts were made to interject in that bill amendments to the Tariff Act of 1922 so as to impose *import duties* of 2 to 4 cents per pound upon the various imported oils, but they were rejected (Cong. Rec. Vol. 69, pp. 8483, 8484, 9203). When the Tariff Act of 1930 was under consideration, a number of amendments were offered from the Senate floor, (a) to levy protective *import duties* upon competing foreign oils and (b) to remove from the free list certain foreign oils which were free when denatured so as to be inedible. All these amendments were rejected (Cong. Rec. Vol. 71, p. 4914, *et seq.;* Vol. 72, pp. 5717, 5942). When the Revenue Act of 1932 was under consideration amendments were proposed from the Senate floor to levy *import duties* upon these foreign oils, but those amendments also were rejected (Cong. Rec. Vol. 75, pp. 10249, *et seq.* 11095-11116). In the first session of the 72nd Congress a separate bill (H. R. 12835) was introduced providing for an *import duty* upon these foreign oils, but the bill was never reported out by the House Ways and Means Committee. This continued agitation for protection of domestic farm and dairy products against the competition of these imported oils gained new impetus when the domestic products were themselves burdened with a processing tax under A. A. A.; and the agitation came to final fruition in the passage of the Act involved in this suit.

The proponents of this tax successfully contended that since Congress, under the A. A. A., had already provided for a tax upon "the first domestic processing" of certain products of the American farmer and dairyman, the domestic producers were now under a further competitive disadvantage with the cheaper foreign oils and there was an immediate necessity for protecting the American farmer and dairyman against the further importation of these

foreign oils (Cong. Rec. Vol. 78, pp. 6314-6325). Moreover, the declared purpose of A. A. A. was to restore to basic agricultural commodities (defined in the Act as wheat, rice, tobacco, *cotton, field corn, hogs, milk and milk products*[1]) a purchasing power for the farmer equivalent to the purchasing power of such agricultural commodities during the base pre-war period of August 1909-July 1914 (Section 2). To attain this end the Secretary of Agriculture was authorized to make agreements for reduction in the acreage and production of such basic agricultural commodities, whenever he deemed it necessary, and to provide for rental or benefit payments to those farmers who so reduced their production (Section 8). The purpose of A. A. A. to raise the prices of domestic products would be frustrated, said the proponents of Section 602½, if the cheaper competitive foreign oils were to be imported into this country tax-free.

In explaining the reason for the oil processing tax Chairman Doughton of the House Ways and Means Committee said (Cong. Rec. Vol. 78, p. 2513):

> "On account of the unusual conditions existing it was thought by a good many that as we were placing a processing tax on domestic commodities and limiting the production of our farmers that we might put some restriction on the commodities from abroad that compete with our American commodities."

Similarly, the ranking minority member of the House Ways and Means Committee, Congressman Treadway (Mass.) explained the necessity for this tax in the following language (Cong. Rec. Vol. 78, p. 2658):

> "Imported coconut and sesame oils compete directly and indirectly with domestic fats and oils.

[1] By an amendment approved April 7, 1934, 48 Stat. 528, "cattle" and "peanuts" among other farm products were added to the "basic agricultural commodities" covered by A. A. A.

> This competition occurs chiefly with cottonseed oil, lard, tallow, and butter. *Under the Agricultural Adjustment Act, Congress has attempted to restore agricultural prices to their pre-war parity; but this legislation fails to take care of the competition of these foreign oils with domestic oils and fats.* While domestic production is being restricted, imported oils and fats are coming into this country in increasing quantities. * * *
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> * * *
>
> "Due to the low price of these foreign oils, produced at a minimum cost by Philippine workers on a standard of living far below that of the American farmer, and through their large use in the manufacture of soap, vegetable shortening, and oleomargarine, they establish the price of competing domestic oils and fats and bring about destructive and ruinous competition."

Congressman Shallenberger (Nebraska) was concededly the member of the House Ways and Means Committee who was responsible for the oil processing tax being included in the Revenue Bill of 1934 (Cong. Rec. Vol. 78, p. 2513) and it was he who was called upon by Chairman Doughton to explain the reasons for the tax because "He has made a more thorough study of this matter than any other member of the committee." In explaining to the House the reasons for, and the purposes of, this tax, Congressman Shallenberger quoted statistics showing the tremendous growth in recent years in the importation of Philippine coconut oil and continued (Cong. Rec. Vol. 78, p. 2529):

> "The Department of Agriculture is working as hard as it possibly can to lift the prices of American farm products to a level that will give the farmer a fair return. How can this be done as to dairy products, meat products, animal fats, and cottonseed and other vegetable oils, if imported oils are permitted

to flood our markets duty-and-tax free and sold at 2½ cents per pound at the American seaboard?

• • •

"The Government is trying to establish a price for corn by loaning farmers 45 cents a bushel on the corn in the crib. The price of corn is dependent upon the price of fat hogs and fat cattle. Eighty-five percent of our corn crop is fed upon the farm. How can the price of corn be maintained at 45 cents a bushel and hogs sell at 3 or 3½ cents per pound at the farm? Fat hogs and fat cattle are dirt cheap because foreign oils have displaced our lard and fats in our home markets. The American livestock farmer is simply being cooked in cheap coconut oil.

"Last December, just before I came to this session of Congress, I called on one of my farm neighbors to talk over the livestock situation. I found him out in the feed lots feeding his hogs. He had placed a big basket of ear corn on the ground and had backed up to the hog pen and was throwing the corn over his shoulder to the hogs in the pen. I said to him, 'Joe, why do you feed your hogs in this strange fashion?' He said, 'Well, you see, I've lost so much money feeding this high-priced corn to these low-priced hogs I cannot look a hog in the face any longer, and I have to feed them backward.'

• • •

"I want you to note that this 5-cent excise tax[1] to raise the price of foreign oils that compete with our home products *fits in with the program of the Agricultural Adjustment Administration in* its efforts to raise prices of American farm products to a living level. The Agricultural Adjustment Administration proposes a processing tax of 5 cents a pound on hogs; a similar tax on cattle; a tax of 5 cents on dairy products; and a compensating tax of 5 cents on oleomargarine.

• • •

[1] As originally proposed and passed by the House. Section 602½ (then Section 602) levied a processing tax of 5 cents per pound on coconut and sesame oils.

"This whole question, which is so vital to the welfare and recovery of the Nation, may be summed up in one sentence. We must consider the interests and welfare of the American farmer first. We will never get the farmer out of the ditch of depression into which he has fallen *unless we relieve him from the unfair foreign competition which is destroying him.*"

Said Congressman Johnson of Minnesota (Cong. Rec. Vol. 78, p. 2612):

"The American farmer for years has petitioned Congress to aid them in their just fight for a home market *that would be protected against this pernicious flood of coconut and sesame oils.* • • • Today every farmer in this country is anxiously awaiting Congress' action on this part of the revenue act. We must not fail them now. • • • *We must give the farmer the protection that his home market needs.* • • • *Let us not desert him on this real chance to help.*"

Congressman Knutson (Minnesota), also a member of the Ways and Means Committee, in debating this tax on the floor of the House said (Cong. Rec. Vol. 78, p. 2614):

"The large users of vegetable oils naturally oppose this tax *because it will tend to force them to the use of American-produced fats and oils.* Four or five attempts were made in the committee to strike out or modify the Shallenberger amendment, but our forces held without a break • • •.

"• • • The American farmer has seen his products displaced in the domestic market by huge importations of vegetable oils and copra from the Orient. Our farmers are asked to reduce production but the Government is giving no heed to the agricultural products that are coming in and replacing the reductions effected. *In other words, every reduction made*

merely serves to increase the market for foreign products so the American farmer does not gain any benefit from the reduction program. There are but two methods that will help him: Embargoes on all imports that compete with home produced products, or compensatory taxes on such imports. In this instance we seek to impose a tax which in my judgment is preferable."

In the course of the debate, Congressman Brooks (Pennsylvania) said (Cong. Rec. Vol. 78, p. 2702):

"The object of this tax is to raise the whole price structure of not only the oils and fats but will have its effect on all dairy products as well as prices of hogs and beef cattle. I sincerely believe that *it will be impossible for the Agricultural Adjustment Administration to raise these prices unless this tax is put on the importation of foreign oils.* If we are right in our policy of excluding Asiatic labor on account of the competition with our own labor, why, *we are justified in curtailing and limiting the importation of products which are so destructive to our domestic products.*"

Congressman Christianson (Minnesota) said (Cong. Rec. Vol. 78, p. 2785):

"To kill several million little pigs will not give us 8-cent hogs if the vacuum thus created can be filled by products from abroad. Vealing calves will not raise the price of butter if the *coconut cow* is permitted to glut our market."

Congressman Dickinson (Missouri), also a member of the House Ways and Means Committee, stated the reason for the tax in these words (Cong. Rec. Vol. 78, p. 2792):

"I actively favored in the committee a 5-cent tax upon coconut and sesame oils, which tax is carried in the pending bill. * * * The farmers of the United States are entitled to this protection *from the im-*

portation of these foreign oils that are destroying the markets for the oils and fats of the farmers of the United States. The cheap importation of foreign oils, particularly from the Philippines, is breaking down the buying power of the farmer and lessening the price of hogs and cattle and corn."

In debating the tax, Congressman Burke (Nebraska) had this to say (Cong. Rec. Vol. 78, p. 2809):

"Shall we continue to tax ourselves to pay the raiser of hogs, to further curtail his production in order to create a larger market in this country for coconut oil.

* * * *

"*This is farm relief that really means something.* The first step is this excise tax on coconut and sesame oils. This provision of the revenue bill should meet general approval."

Similarly, throughout the debates in the Senate, we find that the motive for the oil processing tax was the necessity, created by the processing tax provided for in A. A. A., of protecting the American farmer and his products by levying a tax upon the imported oils. This was succinctly expressed by Senator Byrnes (South Carolina) (Cong. Rec. Vol. 78, p. 6314):

"Mr. President, if there is a processing tax upon hogs, why cannot a competitive tax be levied upon coconut oil if such oil comes in competition with our product?"

Senator Reed (Pennsylvania) of the Finance Committee expressed the same idea in the following colloquy with Senator Tydings (Maryland) (Cong. Rec. Vol. 78, p. 5966):

Mr. Tydings: "* * * The Senator from Pennsylvania knows, I am sure, that *the primary purpose of this*

tax is not revenue, but its primary purpose is to discriminate against the Philippine people.

Mr. Reed: *"The primary purpose of the processing tax is to raise prices and not to raise revenue."*

To the same effect Senator Shipstead of Minnesota (Cong. Rec. Vol. 78, p. 6314):

> *"* * * The purpose of this tax is to raise the price level in the United States of domestic articles that compete with Philippine products.* The purpose is to raise the price of butter, if you please. *It is a price-raising tax."*

Senator Connally of Texas stated the reason for the bill thus (Cong. Rec. Vol. 78, p. 6316):

> "Let us see what else we are doing to the American farmer. We tell him by law how much he has to cut down his cotton production. If he does not do it we are going to put him in jail or otherwise punish him. Every time we cut down our cotton production we cut down our cottonseed. We do not have as much cottonseed oil to sell the next year as we have now. *In the meantime we fill up the gap which we have created in our own product by letting the Philippines send over here larger amounts of oil and more coconuts.* What good does it do to reduce our own production of oil if we are going to permit the Philippines or the Africans or the people in Borneo or Java or the other islands of the seas simply to fill up the gap we are trying to create, by their shipping us some more of their oil that does not require any labor to produce? That is the situation we are facing."

Said Senator Norris (Cong. Rec. Vol. 78, p. 6380):

> "Within the last year or so the administration has started on a farm-relief program. We have limited the production of all, or practically all, farm products. The farmer, concerned with that limita-

tion, finds that fats and oils imported from the Philippine Islands do not have to pay a tax under the tariff law, and therefore, without any tax of any kind levied upon them, come in competition with the fats and oils produced in this country. * * *"

If the purpose of Section 602½ had been revenue, is it conceivable that Congress would have provided, as it did in said section, that the revenue from the principal oil, viz., Philippine coconut oil, should not be paid into the general treasury but should be segregated and paid over to the Philippine Islands? That revenue was not the motivating purpose in enacting Section 602½ is clearly illustrated by the following excerpts from the remarks of Senators Connally and Norris in debating the Norris Amendment (Cong. Rec., Vol. 78, pp. 6381, 6382, 6383):

Mr. Connally: "Mr. President, I desire to ask the Senator a question about his amendment. Suppose the Filipino government should say, 'We will take this tax, and then we will just pay it back to the producer.'

Mr. Norris: "They cannot do it under the amendment.

* * *

Mr. Connally: "If that be true, I cannot see why the amendment would not have the effect of aiding the domestic producer, *because the tax would be paid, and it is immaterial from his viewpoint what is done with it, whether it is thrown in the sewer or given to the Philippine government.*

* * *

Mr. Norris: "But the American farmer is faced with the fact that copra and coconut oil from abroad take the place of the fats he produces at such a price that it is conceded he cannot compete with them. If we by law raise the price of the Philippine product and *give the money back to the Philippine government,*

I do not see where they have much reason to find fault with the legislation.

* * *

"* * * I could stand on this floor for hours and tell of the enormous amount of American-produced fats which have been forced out of the market because of the importation of these particular oils. We have recognized that fact by imposing a tariff upon the same kind of production which comes from every *foreign* country on earth in order to protect the American farmer and protect him from competition that is absolutely ruinous. So the American farmer is worked up about it.

* * *

"Mr. President, I do not believe there is any injustice contained in my amendment. When we shall give the money collected on Philippine products back to the Philippine government, it seems to me we will have compensated them for any wrong that might otherwise have been inflicted. *We shall have not taken a penny of the money ourselves, and we shall have protected the American farmer in the only place where, under the law, there is a loophole. The American farmer cannot get protection unless we do something of this kind.*"

2. The tax levied by Section 602½ was enacted in lieu of a duty and its purpose was to restrict future imports.

It is apparent from the above quotations that Section 602½ was enacted to restrict future imports.[1] But it had become impossible, without a breach of faith, to place an *import duty* on coconut oil coming from the Philippine Islands, the principal source of that oil. The Philippine

[1] For additional excerpts from the Congressional debates showing that Congress intended to restrict future imports of the specified foreign oils and not to raise revenue, see Appendix, pp. 82-84.

Independence Act of March 24, 1934 (Ch. 84, Sec. 6(b), 48 Stat. 456, p. 459, 48 U. S. C. A. 1236(b)) had specifically authorized the importation, free of duty, of 200,000 long tons (440,000,000 lbs.) of Philippine coconut oil each year for a period of ten years. When the section under consideration was introduced into and passed by the House (taxing in its then form only coconut oil and sesame oil), it did not provide for a tax at the point of importation (a duty) but the section levied a tax which would attach to the earliest manufacturing use of the imported oil after it entered the United States, *i. e.*, a tax upon "*the first use in the United States*, in the manufacture or production of an article intended for sale."

In the Senate the debate centered around the tax on Philippine coconut oil and whether such tax constituted a moral, if not a technical legal violation of the Philippine Independence Act (Cong. Rec. Vol. 78, pp. 6308-6324). Senator Harrison, Chairman of the Finance Committee, who was in charge of the bill in the Senate, and many other Senators earnestly urged that the tax was such a violation and that its enactment in the Revenue Bill of 1934, without some concession for Philippine coconut oil, might cause the President to veto the entire bill (Cong. Rec. Vol. 78, pp. 6311, 6317, 6323, 6383). To meet this situation, Senator Harrison proposed an amendment to exempt from the tax 520,000,000 pounds of Philippine coconut oil each year (the average annual importation for the five preceding years, 1929-1933).

That amendment was rejected but to offset the economic impact of this tax upon the Philippines, amendments to subdivision (a) of Section 602½ were adopted (1) providing for a surtax of 2 cents per pound on coconut oil of non-Philippine origin (Conf. Report #1385, App. p. 85),

and (2) providing for the segregation and payment into the Philippine treasury of the entire tax collected on Philippine coconut oil so long as the Philippine government does not subsidize the producers of Philippine coconut oil or the growers of copra from which such oil is extracted (Cong. Rec. Vol. 78, pp. 6379-6389).

Senator Norris proposed the amendment providing for the payment of the Philippine coconut oil tax over to the Philippine government. In introducing his amendment he said (*id.* p. 6380):

> "It seems to me we are confronted with the fact that it is very difficult to do justice both to our wards, the Filipinos, and to the American farmer. When the farmer finds himself thus handicapped, he is justified in the belief that he must have some protection against the importation of coconut oil and copra from the Philippine Islands *which, under existing law, can be brought in without the payment of any tariff tax.*"

Throughout the debates it was recognized that the tax would have the same effect as though a duty had been levied. This is illustrated by the following colloquy between Senators Norris and Tydings (Cong. Rec. Vol. 78, p. 6382):

> Mr. Norris: "The Senator's contention, as I see it, is just the same as though we levied a tax on the products of the Philippine Islands. Technically we could do that; legally we could enact that kind of law and enforce it. Morally it would be wrong. I myself have always opposed *the levying of tariffs* upon the products of the Philippine Islands, particularly when we take into consideration the fact that we are holding them under our government without their consent. It is so abhorrent to think that under those conditions we should levy *a tariff tax* that I should like to find *some way to help the American farmer without resorting to that kind of a remedy.*
>
> * * *

Mr. Norris: "* * * *What is the object of all this legislation? What is the object of all our farm legislation? It is to increase the prices of the products of the farmer. This amendment would have that effect, I admit.* It would raise the price to the consumer of these oils. There is no doubt about that. *That is the object we have in view.*

* * *

Mr. Tydings: "I do not mean that that is the actual way in which it would be carried out, *but it would be the same as if we passed a tariff act levying a tax of 3 cents on those commodities.*"

The purpose of the tax being to restrict future imports it seems clear that Congress did not contemplate a tax upon those foreign oils which the domestic manufacturer had already used in his manufacturing operations prior to May 10, 1934. The levying of a tax on such processed foreign oils already in use by the manufacturer would not have enlarged the market for domestic fats and oils. Nor would it affect the price level. *To the extent of his current supply of processed oils on hand the domestic manufacturer was not a customer for domestic fats and oils as substitute raw materials.* Obviously, no such manufacturer would throw away such processed oils. He would use up his supply of processed oils on hand before he became a customer for domestic fats and oils as substitute raw materials. This is exactly what petitioner did, notwithstanding that under the Commissioner's regulations it was faced with a tax as great or greater than the cost of the processed oil. Because the manufacturer was bound to use up his supply of processed oils on hand and would not substitute domestic fats and oils therefor, the levying of a tax on such processed oils on hand could not affect the price level of domestic fats and oils. A tax upon the first domestic processing after the effective date of the tax of oils which had been previously processed.

would merely have penalized the domestic manufacturer without any consequent benefit to the American farmer. For the same reason, we submit, Congress did not see fit to enact a floor-stock tax as a supplement to the oil processing tax, although the cottonseed oil producers urged such a tax at the hearings. To have imposed a floor-stock tax upon domestically processed oils then being converted into finished products would likewise *not have increased the market for, nor the price of,* domestic farm products as raw materials because the latter could not be substituted for the foreign oils already used as ingredients in the articles then in process of manufacture.

The Court below recognized that Section 602½ was enacted as a substitute for an import duty saying (Rec. p. 34):

> "Congress in order to protect the American farmer, but also to keep faith with the people of the Philippines, substituted for an impost upon Philippine oil the tax provided by Section 602½."

But the Court below in construing the tax did not stop at giving it the effect of an import duty. On the basis of a speculation as to what Congress *might have desired* to do, the Court extended the tax to domestically processed oils already in the United States when the tax became effective. The majority opinion states (Rec. p. 35):

> "Our difficulty in accepting these arguments lies in the fact that *we can see no reason why Congress should not have desired* to protect domestic fats against competitive imported oils whether prior to the passage of the act these had been processed within the United States or not."

If Congress had been free to levy an import duty that clearly is what it would have done and an import duty would not have

reached the processed oils involved in the cases at bar. We need not speculate as to what Congress *might* have desired to do. Its purpose is clearly shown in the debates. It was to restrict future imports. If Section 602½ was intended as a substitute for an import duty, as the Court below found, and if that purpose is accomplished by construing the tax language in its normal and usual sense, what warrant is there for construing "first" in any other sense? There is nothing in the language itself, the Committee Reports or the debates, to indicate that Congress intended in Section 602½ to do more than levy upon the foreign oils a tax upon their first use after they cleared the custom-house; there is no suggestion of protecting domestic fats against foreign oils which at the time of enactment had already been imported and domestically used and were then in the course of being converted into finished products. That suggestion comes only from the majority opinion of the Court below—and then upon pure speculation by the Court as to what might have been the intent of Congress, ignoring the actual intent expressed in the debates.

The Court below could "see no reason why Congress should not have desired to protect domestic fats against competitive imported oils whether prior to the passage of the act these had been processed within the United States or not." We think we have shown an excellent reason—it couldn't be done. We have pointed out that the imposition of a tax on oils already domestically processed and in course of conversion to finished articles could neither have increased the market for, nor the price of, domestic fats and oils as substitute raw materials (*supra*, p. 36).

3. The tax intended to be levied was precisely the same kind of processing tax as had been provided for in A. A. A.—a tax upon the earliest domestic processing.

It is clear from the debates that Congress meant to levy on these foreign oils *the same processing tax* to which domestic products with which they competed were subject under A. A. A.

Throughout the debates, Section 602½ was considered by proponents, supporters and opponents alike, as though it were a supplement to the Agricultural Adjustment Act.

Congressman Reed (New York), a member of the House Ways and Means Committee, in debating this tax on the floor of the House, said (Cong. Rec. Vol. 78, p. 7246):

> "* * * The proposed tax is levied upon the first domestic processing of coconut oil, and this is defined as the 'first use in the United States, in the manufacture or production of an article intended for sale' of coconut and other oils. *Thus the tax is no different in effect from the several processing taxes levied under the Agricultural Adjustment Act* upon basic farm commodities."

In speaking for the tax, Senator Carey said (Cong. Rec. Vol. 78, p. 6311):

> Mr. Carey: "The Senator is aware of the fact that, under the Agricultural Adjustment Act, it is possible for the Secretary of Agriculture to levy taxes on commodities which compete with other commodities. There are on hand in this country a large amount of fats in storage, consisting of butter, lard, tallow, and cottonseed oil, most of which are subject to processing taxes. Does the Senator think it *fair to relieve the Philippine Islands from a tax such as the one under discussion when the American farmer is subject to all these taxes?*
>
> * * *

Mr. Carey: "* * * I cannot see *why they should be exempt* from the payment *of the same tax* we are putting on ourselves."

Senator Reed of the Senate Finance Committee also pointed out the similarity of the two taxes (Cong. Rec. Vol. 78, p. 6312):

> "I am not complaining about the result of our own actions, but I say that when we impose processing taxes which bear so cruelly on our farmers as does the present tax on hogs, for example, we are only treating the Filipinos *as we are treating our own people when we put similar taxes on their products.*"

Senator Shipstead (Minnesota) stressed the identity of the two taxes (Cong. Rec. Vol. 78, p. 6314):

> "I cannot see the difference between putting *a processing tax* upon coconut oil * * * and putting *a processing tax* on hogs or any other things manufactured in the United States."

Senators Borah and Harrison, in opposing the tax, suggested that this matter should be handled under the A. A. A., by amendment if necessary, rather than in the Revenue Act of 1934 (Cong. Rec. Vol. 78, p. 6314).

Mr. Borah: "* * * We have an act by which we could treat them [the Filipinos] as citizens and deal with them the same as with other citizens of the United States, and that is the Agricultural Adjustment Act. There is no reason why these matters should not be dealt with under that act. It may be *that it would require an amendment.* I have not the act before me.

* * *

Mr. Harrison: "I may say to the Senator from Idaho that the Secretary of Agriculture suggested that this matter should be dealt with under the Agricultural Adjustment Act and that we might fix quotas, and processing taxes, and so on."

The following colloquy between Senator Connally (Texas), a member of the Senate Finance Committee, and Senator Borah shows clearly the identity of these two processing taxes. (Cong. Rec. Vol. 78, p. 6316 *et seq.*)

Mr. Borah: "I want to ask the Senator a question which I submitted a few moments ago. Could not all this be done under the present Agricultural Adjustment Act?

Mr. Connally: "It is a long process to have the Department of Agriculture tinkering with the Philippines. It might be done. I have great respect for the opinions of the Senator from Idaho, but whenever I am trying to do something and a man comes up and says, 'This is fine; but why not do it some other way?' I always have a suspicion as to whether he wants me to do it at all or not.

Mr. Borah: "*I am thinking of the fact that the Agricultural Adjustment Act covers exactly this condition of affairs. Why should we legislate in this bill in addition to what we have already done by the Agritural Adjustment Act?*

Mr. Connally: "The Senator's suggestion is logical, but we are not legislating now with reference to the Agricultural Adjustment Act. We have not got it up now, but we have this other matter up, and as long as we have it up why not do it? Why put it off till tomorrow what we can do today?

Mr. Borah: "I am contending that it has already been done.

Mr. Connally: "But it has not already been done.

Mr. Borah: "Why has it not already been done? The Secretary of Agriculture has the power under the Agricultural Adjustment Act to do what it is proposed here shall be done.

Mr. Connally: "On coconut oil?

Mr. Borah: "Yes.

Mr. Connally: "I do not think coconut oil is mentioned.

* * *

Mr. Connally: "• • • We are going to *bring in* some of this coconut oil even if it does pay a processing tax. There are certain kinds of soap which it is said require coconut oil. But as a general proposition the chemists and experts testify that there is a very considerable interchangeability among all these oils, and that therefore *if the oils were kept out they would use domestic oils to take the place of the coconut oil.*

"Mr. President, in the committee this tax was reduced from 5 cents to 3 cents. It is not a prohibitive tax. It is a moderate tax. *It is simply carrying out the principle of the new system we have adopted.* If we limit our own people, if we tax our own people, if we put *a processing tax on our own people*, why should not the Filipinos themselves bear a small tax now and then in order *to help us to carry out the program for the rehabilitation of American industry and American agriculture?*"

Senator George of the Finance Committee argued (Cong. Rec. Vol. 78, p. 6321):

"• • • But the fact is that we not only have limited [in A. A. A.] the production of the oil producers in the United States but we have put a *processing tax* upon those same producers, and it is obviously fair to put a *processing tax* upon the products of the Philippines. • • •"

Senator Norris agreed that an amendment of A. A. A. might be another way of accomplishing the same end but he said that would require the drafting of another bill (Cong. Rec. Vol. 78, pp. 6381 *et seq.*).

Mr. Reed: "• • • *Why is it any more unfair to the Filipinos to put a processing tax* on one of their agricultural products than *it is unfair to our own farmers to put a processing tax on their products?*

Mr. Norris: "I do not think it would be any more unfair.

• • • •

Mr. Norris: "• • • The Philippine people are not included in the law, however. They are expressly exempted from the law that enables the Secretary of the Treasury to put a processing tax upon the people of the United States.

• • •

Mr. Reed: "*We could extend the A. A. A. by an amendment to cover the Philippines.*

Mr. Norris: "I think probably we could.

Mr. Borah: "*That is really what we are doing in this bill.*

• • • • •

Mr. Norris: "• • • The law exempts the Philippine Islands. That may have been wrong, but it is now the law. They are expressly exempted in the act that empowers the Secretary of Agriculture to levy a processing tax upon the American farmer.

"The Senator says *we ought to levy this tax on the Filipino farmer just the same.* The Senator may be right, but we have not now the law under which we can do that. We might amend the law and do it. In my judgment, it is simply tantamount to saying, 'Your remedy is not right. Let us take another one.' I agree that probably a law might be drawn which would meet the proposition in the way the Senator has suggested, but we are not now confronted with that situation.

• • • •

Mr. Tydings: "I wish to point out the distinction between the effect of *the law upon the Filipino and upon the American farmer.* • • • But may I point out that *the processing tax on the American farmer* is ostensibly a tax levied for the benefit of the American farmer, while *the processing tax levied on the Filipino*

is a tax, not for the benefit of the Filipino but of the American farmer. * * *

* * *

Mr. Borah: "May I suggest to the Senator from Maryland that while the processing tax is, as he says, 'ostensibly' for the benefit of the American farmer, as a practical fact, *it would have exactly the same effect upon the American farmer as upon the Filipino.*

Mr. Tydings: "I think there is much in the Senator's contention, but I simply wanted to point out that the purpose is different.

Mr. Norris: "I think there is something in the contention, but the suggestion that has come from the Senator from Pennsylvania [Sen. Reed] is simply to this effect, as I see it: 'I am opposed to your remedy, I am opposed to doing it that way; *I want to do it some other way*' [*i.e.* by Senator Reed's suggested amendment of A. A. A.]. He may be right about that; *there may be a better way,* but faced as we are with the pending bill, *it would be folly to stop its consideration long enough to frame a statute that would carry it out in the other way.* There would be great difficulty. At the time we framed the statute [A. A. A.] we expressly exempted the Philippine Islands and had in mind as one of the things, the suggestion that has so well been made by the Senator from Maryland. [Moral obligation to the Philippine Islands not to tax their products.]

* * *

Mr. Reed: "The amendment as reported by the Committee on Finance expresses exactly, to my mind, the fair way of accomplishing the desired result. It imposes a *processing tax* of 3 cents a pound directly on *the competing oils.*"

Not only did Congress intend to levy on the foreign oils the same tax on "the first domestic processing" to which competing domestic products had been made subject

under A. A. A. but Congress was well aware that that tax was upon the earliest domestic processing. In debating the tax, Congressman Johnson (Minnesota) said (Cong. Rec. Vol. 78, p. 2611):

> "Section 602 of this act provides that a tax of 5 cents per pound be placed on the processing of all foreign coconut and sesame oils in manufacture or production of an article for sale. This processing tax [is] to apply *to the first use of this oil*, and would also apply on the manufacture of mixtures and combinations of this oil."

Said Congressman Burke of Nebraska (Cong. Rec. Vol. 78, p. 2809):

> "Section 602 of the revenue bill now under consideration imposes a *processing* tax of 5 cents per pound *on the first use of coconut oil* in the manufacture or production of an article for sale. If the preliminary processing is done outside of the United States, then the tax is imposed *on the first processing in the United States* of mixtures or combinations in chief value of coconut oil. What effect can we expect from the imposition of this tax? * * * The effect of this tax will not be to put an embargo on the importation of coconut oil, but it will raise the price so that our domestic fats and oils will be used again in something like the former proportion in the making of soap, margarine, and other products. An increase of 3 or 4 cents a pound on cottonseed oil and the fatty content of hogs and cattle will mean hundreds of millions of dollars additional income to the cotton farmers and the hog and cattle producers of the country."

It is thus impossible to read the debates on this tax without being forced to the conclusion that the specific purpose of Congress in enacting Section 602½ was the *restriction*

of future importations of the foreign oils, particularly coconut oil, so as to compel domestic manufacturers to substitute domestic farm products for the foreign oils and for the further purpose of supplementing the A. A. A. by closing a loophole in that Act; and that with respect to such foreign oils as might be imported into this country, the tax was to attach to the first or earliest use after importation—"the first use in the United States" as defined in said Section 602½. This tax could not be an import duty without a clear violation of the Philippine Independence Act. *But it could be the same kind of processing tax imposed by the A. A. A. upon domestic commodities with which these oils were in competition.* So Congress levied the tax upon "the first domestic processing" of the specified oils, using the same phraseology the same Congress had used a year earlier in providing for a tax upon the actual first domestic processing of certain basic farm products under the A. A. A.

We do not find in the language of Section 602½, nor in the Committee Reports (as we show below), nor in the debates preceding enactment, any reference to "first" in the sense of "first after the effective date"—that is a concept that never entered the Congressional mind. Congress had but one thought, viz., to levy a tax on these foreign oils at the first available point this side of the custom-house.

4. The Congressional Committee Reports.

If we trace the progress of the oil processing tax through the legislative mill from its inception as Section 602 of the Revenue Bill of 1934 to its final enactment as Section 602½, we shall find throughout in the reports (House, Senate and Conference), as well as in the debates the same legislative purpose of protecting the American farmers' products against these oils brought from outside the United States and of restricting their future importation by levying a tax

on the actual first use of such oils within the United States. As introduced in the House, subdivision (a) of Section 602 reads as follows:

> "Sec. 602. Tax on Certain Oils.
>
> "(a) There is hereby imposed upon *the first domestic processing* of coconut oil or sesame oil, or of combinations or mixtures brought into the United States in chief value of either or both such oils, a tax of 5 cents for each pound thereof processed, which shall be paid by the processor. *For the purposes of this section, the term 'first domestic processing' means the first use in the United States, in the manufacture or production of an article intended for sale, of the article with respect to which the tax is imposed.*"

It will be noted that the statutory definition of the taxable transaction (*i. e.*, "the first domestic processing,") as originally proposed, remained intact throughout the legislative debates and was enacted into law. In explaining the tax intended to be levied by that Section (then designated as Section 602) House Report No. 704, which accompanied the introduction of the Revenue Bill of 1934, significantly states at page 41:

> "Section 602—Tax on coconut and sesame oils: This section imposes a processing tax on coconut oil and sesame oil. 'Processing' is defined as *the first use* of the oil in the manufacture or production of an article for sale. The tax applies to processing in the United States including the territories, but not the possessions. To prevent avoidance of the tax by the performance of *preliminary processing outside of the United States*, the tax is likewise imposed upon *the first processing in the United States* of mixtures or combinations in chief value of coconut or sesame oil, or of both oils."

It will be noted that the House Ways and Means Committee in Report No. 704 explained unequivocally that "*the tax is * * * imposed upon the first processing in the United States.*" Also, that to prevent avoidance by "preliminary processing *outside of the United States*" the tax is imposed "upon *the first processing in the United States.*" This juxtaposition of language in the Report shows clearly that "first" was used in relation to the *entry* of the oils at the custom-house; the processing taxed was "the first" manufacturing use after entry of the oils. Congress intended to tax and did tax "the first processing in the United States," as the Report states.

After passage in the House of subdivision (a) of Section 602 in the form above quoted the Revenue Bill was sent to the Senate and referred to the Senate Finance Committee. That Committee re-wrote subdivision (a) making the following changes as outlined in Senate Report No. 558 at page 52:

> "The House bill imposes a tax of 5 cents a pound on the first domestic processing of coconut oil, sesame oil, and mixtures brought into the United States in chief value of either or both such oils. The Committee amendment reduces the rate to 3 cents and extends the tax to palm oil, palm-kernel oil, sunflower oil, imported whale oil, imported fish oil, imported marine-animal oil, combinations of the oils enumerated in the section, and mixtures containing substantial quantities of any one or more of such oils. The use of palm oil in the manufacture of tin plate is exempted from the tax."

It will be noted that to further protect the local farmer and dairyman the Senate Finance Committee considerably broadened the statute by adding a number of both *imported* vegetable oils and *imported* fish oils to the taxable items

thereby intending to induce manufacturers to substitute domestic oils and fats for the specified imported oils.

Since, however, there is no substitute for the use of palm oil in the manufacture of tin plate and no protective purpose could be subserved by taxing such use, the Senate Finance Committee specifically exempted that particular use of palm oil—*a clear indication of the protective purpose of the tax.* And it was so explained to the Senate (Cong. Rec. Vol. 78, p. 6318).

On the floor of the Senate, the Norris amendment providing for payment to the Philippines of the tax collected on Philippine coconut oil was adopted.

Section 602 with the above amendments and with other changes not here pertinent was passed by the Senate.

The Revenue Bill was then sent to conference and in Committee the conferees re-wrote said Section 602 dividing it into two parts, as follows: the tax with respect to imported whale oil, imported fish oil and imported marine-animal oil was changed from a *processing* tax to an *import* tax under Section 601(c) of the Revenue Act of 1932 and was enacted as "Section 602" of the Revenue Act of 1934, and the vegetable oil processing tax as such was renumbered as "Section 602½" and was enacted in the form in which it appears in the 1934 Act. (See App., pp. 75, 76 for relevant parts.)

Conference Report No. 1385 showing the changes made by Conferees is set out in the Appendix at page 84. Two points therein are of importance. (a) The Report, in referring to "first domestic processing" explains parenthetically the meaning of that phrase in the following language: "*defined as the first use in commercial manufacture or production.*" (b) With reference to the change of the tax upon imported fish and marine-animal oils from a *processing* tax to an

import tax the Report states that the Conference Amendment "changes the *point of imposition* of *the tax* • • • to the *importation* instead of the first domestic processing." That is to say, there was merely a shift of the tax on these particular oils from the first processing after the entry (the point of imposition under Section 602½) to the entry itself. The vegetable oils remained subject to taxation at the original point of imposition, viz., their "first use in commercial manufacture or production." These two points, we think, lead indubitably to the conclusion that Congress was thinking of the first actual use of the imported oil as the transaction taxable under Section 602½.

Representative Hill of Washington was Chairman of the subcommittee of the House Ways and Means Committee which worked all during the Summer Recess of 1933 in drafting the Revenue Bill of 1934 and was also one of the conferees who composed the differences between the bills adopted by the House and the Senate. While presenting the Conference Report to the House for adoption, he was asked to explain Amendment 153 as agreed to by the conferees and he replied (Cong. Rec. Vol. 78, p. 7833):

> "Well, we put a 3-cent tax on coconut oil—that is, on *the first processing of coconut oil*—that comes from the Philippine Islands and other possessions of the American Government. We put a 5-cent processing tax on coconut oil that comes from countries outside of American possessions and the Philippine Islands."

Again, the word "first" is used in the sense of initial or earliest after arrival in the United States.

In the light of this legislative history it becomes entirely clear, we submit, that the interpretation which the majority of the Court below has given to the section is in fact judicial legislation, which is not in accord with the pur-

pose that Congress had in enacting the section. On the other hand, the construction which petitioner contends for—and only that construction of the tax—gives effect to the legislative intent and purpose of the tax as revealed (a) by all the debates in both Houses of Congress, and (b) by the Committee Reports. That construction—and only that construction—is consistent with the Treasury Department's own interpretation under A. A. A. of the same taxing phrase "the first domestic processing," which interpretation was then in effect and from which Act the statutory language of Section 602½ was derived practically verbatim (App. pp. 77-81). That construction—and only that construction—gives to the words employed in the statutory definition of the taxable event ("the first use in the United States") their usual and normal meaning.

POINT IV.

The amendment of Section 602½ adopted in Section 702(a) of the Revenue Act of 1936 does not show that "it was the intention of Congress to tax the designated oils or combinations not previously taxed under the section, whether processed prior to the passage of the 1934 Act or not," as the Court below held.

The Court below originally found with respect to the 1936 amendment that "since the statute was not reenacted in identical language the rule of congressional confirmation enunciated by *Brewster* v. *Gage*, 280 U. S. 327, 337 and *Mass. Mutual Life Ins. Co.* v. *United States*, 288 U. S. 269, 273, cannot be applied" (Rec. p. 36). On the Petition for Rehearing a majority of the Court below reversed its position holding that the 1936 Amendment did constitute legislative approval of the regulation (Rec. p. 43). On a

Petition for a Second Rehearing, however, the Court below, while denying the petition, entered an order (Rec. p. 50) striking out *inter alia* the holding in its Opinion on Rehearing that the 1936 Amendment constituted legislative approval of the Treasury regulation, thus reverting to its original opinion that it did not.

However, notwithstanding that the Court below finally held that the 1936 Amendment did not constitute legislative approval of the Treasury regulation, the majority of the Court nevertheless held baldly "that the amendment shows it was the intention of Congress to tax the designated oils or combinations not previously taxed under the section, whether processed prior to the passage of the 1934 Act or not" (Rec. p. 37). There is no reason assigned in the opinion for this holding. Petitioner can only infer that it arose because of the misapprehension of the facts with respect to the legislative history of this amendment evidenced in the Court's opinion.

These are the facts with respect to that amendment. As passed by the House the Revenue Bill of 1936 contained no amendment of Section 602½. The Senate Finance Committee proposed in Section 702(a) of that bill an amendment of the first sentence of Section 602½ of the Revenue Act of 1934. This amendment was adopted by the Senate but the House did not concur, and in conference Section 702(a) was entirely rewritten, substantial changes being made in its revision. For the convenience of the Court we quote in parallel columns Section 702(a) as originally passed by the Senate and as revised by the Conference Committee and subsequently enacted into law.

Section 702(a) As Originally Passed by the Senate

"(a) There is hereby imposed upon the first domestic processing of coconut oil, palm oil, palm-kernel oil, fatty acids derived from any of the foregoing oils, salts of any of the foregoing (whether or not such oils, fatty acids, or salts have been refined, sulphonated, sulphated, hydrogenated, or otherwise processed), or any combination or mixture containing a substantial quantity of any one or more of such oils, fatty acids, or salts with respect to any of which oils, fatty acids, or salts there has been *no previous first domestic processing* and no import tax has been paid under section 601(c)(8) of the Revenue Act of 1932, as amended, a tax of 3 cents per pound to be paid by the processor."

Section 702(a) As Revised by the Conference Committee and Enacted Into Law

"(a) There is hereby imposed upon the first domestic processing of coconut oil, palm oil, palm-kernel oil, fatty acids derived from any of the foregoing oils, salts of any of the foregoing (whether or not such oils, fatty acids, or salts have been refined, sulphonated, sulphated, hydrogenated, or otherwise processed), or any combination or mixture containing a substantial quantity of any one or more of such oils, fatty acids, or salts, a tax of 3 cents per pound to be paid by the processor, *but the tax under this section shall not apply (1)* with respect to any fatty acid or salt resulting from *a previous first domestic processing taxed under this section* or upon which an import tax has been paid under section 601(c)(8) of the Revenue Act of 1932, as amended, or *(2)* with respect to any combination or mixture by reason of its containing an oil, fatty acid, or salt with respect to which there has been *a previous first domestic processing* or upon which an import tax has been paid under such section 601(c)(8)."

It will be noted (1) that fatty acids and salts (newly added to the taxable articles) and mixtures and combinations were all treated alike under the Senate amendment; but (2) that under the revised amendment as finally adopted two exemption clauses were inserted resulting in a different treatment of fatty acids and salts, on the one hand, and of combinations and mixtures, on the other, *i. e.*, it was provided that the tax "shall not apply

(1) with respect to any fatty acid or salt resulting from a *previous first domestic processing taxed under this section* • • • or

(2) with respect to any combination or mixture by reason of its containing an oil, fatty acid, or salt with respect to which there has been a *previous first domestic processing* • • •"

In commenting on this revision the majority opinion of the Court below says (Rec. p. 36):

> "• • • the bill was rewritten in committee *and the words 'taxed under this section' was added to the phrase 'no previous domestic processing.'*"

This is inaccurate not only in its description of what the Conference Committee did, but even more importantly in its implication that the committee did no more than is described. The statement in the opinion that "the words 'taxed under this section' was added to the phrase 'no previous domestic processing'" is clearly incorrect because the amendment as "rewritten in committee" contains no clause reading "*no* previous domestic processing taxed under this section." That error is crucial. Instead of adding words to the phrase "no previous domestic processing" the Conference Committee eliminated that phrase altogether and substituted therefor two separate and differently worded exemption clauses which show conclusively that Congress

recognized that there were "first domestic processings" which were taxable, *i. e.*, those occurring after May 10, 1934, and "first domestic processings" which were not taxable, which could only be "first domestic processings" occurring before that date. If there had been a mere addition of the words "taxed under this section" to the phrase "no previous domestic processing" there would then have been only *one* limiting clause in the 1936 amendment *applicable alike* to fatty acids, salts, combinations and mixtures. When "the bill was rewritten in committee," however, instead of treating all those articles alike by levying no tax on any of them where there has been a "previous first domestic processing," the revised amendment provided for *two* specific and different exemption clauses, thus separating the fatty acids and salts (new articles added by the amendment) into one group covered by exemption clause (1) and the combinations and mixtures into a second group covered by exemption clause (2). The very fact that the Conference Committee in the revision saw fit to provide for two exemption clauses shows that a differentiation between the two separate groups was intended. The differentiation actually effected was this. Under clause (1) a fatty acid or salt was exempted when "resulting from a previous first domestic processing *taxed under this section*"[1] while under

[1] Fatty acids "result from" the "splitting" of an oil into a fatty acid and glycerine. A salt of a fatty acid, such as soap, usually "results from" the simultaneous splitting of an oil and saponification with a caustic of the fatty acid produced by the splitting. Such a domestic splitting of an oil or simultaneous splitting and saponification might have occurred before May 10, 1934, in which event the splitting, "resulting" in a fatty acid, or the simultaneous splitting and saponification, "resulting" in a salt, *i. e.*, soap, would not have been taxed. Or such a domestic splitting of an oil or simultaneous splitting and saponification might have occurred after May 10, 1934, in which event the splitting "resulting" in a fatty acid, or the simultaneous splitting and saponification "resulting" in a salt, would have been taxed.

clause (2) a combination or mixture was exempted when with respect to the taxable content thereof "there has been a previous first domestic processing" (which might or might not have been taxed dependent on whether such processing had occurred before or after the effective date of the tax).

The majority of the Court below have erroneously referred in the original opinion (Rec. p. 36) to petitioner's contention with respect to the amendment as being based merely on the addition of the words "taxed under this section" in a single clause. Actually petitioner's contention is based and was based in the Court below on the fact that the Conference Committee wrote into the amendment two different clauses, one of them, as stated above, creating an exemption of mixtures and combinations conditioned upon a "previous first domestic processing" and the other creating an exemption of fatty acids and salts conditioned upon their "resulting from a previous first domestic processing *taxed under this section.*"

On the incorrect premise that the Conference Committee added the phrase "taxed under this section" to the phrase "no previous domestic processing" the majority of the Court below reached the conclusion that (Rec. p. 37):

> "Congress intended to tax oils of the designated classes or combinations *which had not been previously taxed under Section 602½(a)* * * *. In short we think that the amendment shows it was the intention of Congress to tax the designated oils or combinations not previously taxed under the section, whether processed prior to the passage of the 1934 Act or not."

This is not the intent expressed in the amendment. As to fatty acids and salts, to be sure, the intent expressed in the amendment is to tax them except when they have resulted from a "previous first domestic processing *taxed under this section*"; but as to combinations and mixtures, the

intent expressed in the amendment is to tax them except when "there has been a previous first domestic processing" (whether taxed or not) of the taxable ingredients. The amendment contemplates that some "first domestic processings" were untaxed and only if "first" means earliest, could there have been an untaxed first domestic processing.

This conclusion of the Court below fails to give any effect whatsoever to the fact of the two separate exemption clauses with a clear-cut distinction between the two exemptions. This distinction in the two exemption clauses (between "a previous first domestic processing *taxed under this section*" and "a previous first domestic processing") was deliberate. It is a distinction made by an amendment carefully drawn by the Conference Committee. It is a fundamental distinction giving meaning and purpose to the creation of the two exemption clauses. If Congress did not intend some differentiation between the two clauses, why the limiting phrase—"taxed under this section"—in the one and not in the other? If this limitation was intended to apply indiscriminately to both exemption clauses, why did Congress deliberately create two exemption clauses, one with and one without the limitation? One may not read this limitation out of the first exemption clause or read it into the second exemption clause. One must construe the amendment as enacted—without deletion or addition.

The limiting phrase "taxed under this section" cannot be brushed aside as mere surplusage. Some effect must be given to it. But it has no effect and there is no conceivable reason for its insertion if "the first domestic processing" means "the first domestic processing after the effective date of the Act." For then every "first domestic processing" would be taxable; there could then be no such thing as an untaxed "first domestic processing." If, however, "first" be taken in its ordinary sense of "earliest" there would be

"first domestic processings" which occurred after the effective date of the tax and were taxed, and "first domestic processings" which occurred before the effective date of the tax and were untaxed. There would be a reason for use of the phrase "taxed under this section."

In the light of the history of the 1936 Amendment and the express language of the two exemption clauses, we submit that there is no reasonable basis for the Court below ascribing to Congress an intent wholly at variance with the language of that amendment. There is nothing in the Conference Committee Report on the amendment to substantiate the Court's view, as that report simply sets out in *haec verba* the text of the amendment as revised by the Committee (House Conf. Rep. #3068). Nor is there anything in the debates to substantiate the Court's view, the amendment as revised by the Conferees having been adopted by the House and Senate without discussion.

It is not incumbent upon the petitioner to give a reason for the distinction between the two exemption clauses of the 1936 Amendment. It is entitled to rely upon the clauses as enacted. However, there are sound reasons for the distinction. What Congress actually did in the 1936 Amendment was to carry forward from the 1934 Act to the 1936 Amendment, without change, the condition prescribed under the 1934 Act for the taxation of combinations or mixtures, viz., combinations and mixtures were not to be taxed if there had been a "previous first domestic processing" of the taxable content thereof. Congress did not at that late date change the condition under which combinations and mixtures had been taxable for more than two years. But with respect to fatty acids and salts, *which were newly added to the taxable articles* by the amendment, the exemption was more narrowly conditioned on their "resulting from a previous first domestic processing *taxed under this section.*"

If Congress in enacting the 1936 Amendment had intended to limit the exemption of combinations or mixtures to those instances where "a previous first domestic processing" had been "taxed under this section," Congress would have inserted the same limitation in clause (2) as it did in clause (1). That such limitation was not so inserted shows that Congress intended that the exemption of combinations or mixtures be continued as it existed under the 1934 Act.

In those cases in which the Courts have found in the reenactment of a former statuory provision an intent to approve the prior administrative interpretation of that provision, the intent so found is merely an imputed and not an expressed intent. As is explained above (*supra*, p. 51) the Court below first held that the 1936 Amendment did not constitute such approval, then that it did, and finally once again that it did not. Certainly the Court was correct in not imputing to Congress in this instance an intent to approve the departmental regulation here in question when Congress adopted specific language recognizing the distinction between taxed and untaxed "first domestic processings" above pointed out?

Looking at the matter realistically, we question whether Congress in enacting the 1936 Amendment concerned itself at all with the regulation in question, because that regulation affected only domestically processed oils on hand on May 10, 1934 and little of those oils could have been left when the amendment was passed two years and three months later. One thing, however, seems to us certain—if Congress did concern itself with the Treasury regulation its concern was not to ratify the regulation. If Congress had intended to approve the regulation, would it have deliberately enacted statutory language which is inexplicable if the regulation is right?

POINT V.

The rule of prospective operation of tax statutes does not require or justify the construction that first means "first after the effective date of the tax."

The majority of the Court below relied for its decision upon "two plain sign-posts," (1) "First * * * a statute is presumed to operate on future acts unless the contrary intent is declared," citing *Hassett* v. *Welch*, 303 U. S. 303, 314.

We do not quarrel with the Court's statement of the rule that "a statute is presumed to operate on future acts unless the contrary intent is declared." That is a proper statement of the rule. That is the very principle upon which the petitioner relies in this case. The tax herein sought to be recovered was illegally collected because "the first domestic processing" of the oils herein occurred prior to the effective date of the tax and under the rule the tax may not be retroactively applied.

All that the rule of prospective operation of statutes means is that a statute is not to be retroactively applied in the absence of a clear expression to the contrary. With specific reference to the statute in question the rule means that if "the first domestic processing" takes place after the effective date of the tax, it is taxed; if it occurs before that date, it is not taxed. In *Hassett* v. *Welch*, *supra*, where the Court was construing an amendment to the Revenue Act of 1926 relative to the estate tax imposed upon the corpus of certain trusts, the Government contended that the amend-

ment was applicable to such trusts created prior to the enactment thereof. But this Court held (p. 307):

> "We hold that the statutes are prospective in their operation and do not impose a tax in respect of past irrevocable transfers with reservation of a life interest."

The rule does not justify the enlargement of the statutory definition of the taxable event beyond the plain import of its words. There can be but one "the first domestic processing." The rule of prospective operation cannot convert a second, third, fourth or fifth domestic processing into "the first domestic processing."

The rule of prospective operation of statutes has been uniformly applied by this Court as a principle of limitation—not enlargement; of exclusion—not inclusion. *Shwab* v. *Doyle*, 258 U. S. 529; *Levy* v. *Wardell*, 258 U. S. 542; *Lewellyn* v. *Frick*, 268 U. S. 238; *Bingham* v. *U. S.*, 296 U. S. 211; *Hassett* v. *Welch*, *supra*.

The Court below does not cite any precedent that sustains its use of the rule for construing "first" in a sense other than its usual and normal sense. The statute is to be applied prospectively, but in doing so, the Court must confine itself to the statute as written by Congress without additions or interpolations of any kind.

Finally, the principle of prospective operation of statutes was likewise applicable to the tax upon "the first domestic processing" of basic agricultural commodities under A. A. A. The Government did not find that this principle required or justified that "first" be there construed as first after the effective date of the Act. No more does the principle require or justify that "first" be here construed as meaning the first after the effective date of the Act.

POINT VI.

The further grounds upon which the Court below in the cases at bar and the grounds upon which the Circuit Court of Appeals for the Second Circuit in the *Loose-Wiles Biscuit Company* case rested their respective decisions do not sustain the conclusions reached.

A. Further grounds of the opinion below.

The second of the two "plain sign posts" which guided the Court below is introduced in the paragraph beginning: "Second, Treasury Regulations 48 * * * construe the phrase 'first domestic processing' as meaning the first use in the United States after the effective date of the Act" (Rec. p. 35).

We have shown that the interpolation by those regulations of the words "on and after the effective date of the Act" was administrative legislation broadening the scope of the statute and was inconsistent with the legislative history and purpose of Section 602½.

In discussing the "second sign post" the Court below attributes this contention to the Government:

> "* * * The defendant points out that these regulations were promulgated by the Treasury Department pursuant to the provisions of Section 1101 of the Revenue Act of 1926. See 44 Stat. 111. Sec. 602½(f) of the Revenue Act of 1934, 48 Stat. 764, provides that all provisions of Section 600 of the Revenue Act of 1926, 44 Stat. 93, not inconsistent with the provisions of Sec. 602½ of the Revenue Act of 1934 shall be applicable in respect to the taxes imposed by Section 602½. In effect, therefore, contends the defendant, Treasury Regulations 48 were made applicable to Section 602½ of the Revenue Act of 1934."

This contention is cited with seeming approval; there is no other apparent reason for citing it. The fact is that the Government did not and could not make any such contention; the regulations were not in existence when Section 602½ was passed and could not have been made applicable by that section.[1]

In its original opinion, as modified on rehearing, the Court held that Section 402 of the Revenue Act of 1935, 49 Stat. 1026, imposing a compensatory tax upon the importation of articles produced from the oils named in Section 602½, "furnished some evidence that Congress *was not dissatisfied* with the Treasury Department's interpretation" but deleted that by a later order (Rec. p. 50), thus abandoning any inferences from Section 402 of the Revenue Act of 1935. And of course the enactment of a compensatory duty on articles made from these oils would not give occasion for any consideration by Congress of the regulation here in question.

B. Grounds of opinion in *Loose-Wiles Biscuit Company* case.

In *Loose-Wiles Biscuit Company* v. *Rasquin*, 95 F. (2d) 438, the Court took the view that the Treasury Regulation was "a reasonable construction of the statutory language," and held the enactment of the 1936 Amendment "leaving the words 'first domestic processing' unchanged, does, we think, show congressional approval of the administrative inter-

[1] The Court below was confused as to the actual provisions of Section 602½. The opinion states that Section 602½(f) provides that "*All provisions of Section 600* of the Revenue Act of 1926 * * * shall be applicable in respect of the taxes imposed by Section 602½." Section 602½(f) actually provides that "All provisions of law * * * *applicable in respect of taxes imposed by Section 600* of the Revenue Act of 1926, shall * * * be applicable in respect of the taxes imposed by this section."

pretation of that phrase in the statute so persuasively that we should give it effect" (p. 440).

In reaching these conclusions, however, the Court was not advised by the taxpayer or the Government of any of the facts of the legislative history of Section 602½ including the following, nor is any of them referred to in its opinion: (a) that the phrase "the first domestic processing" was derived verbatim from the A. A. A. and had there been construed consistently by the Treasury Department as meaning the first in point of time; (b) that Section 602½ was enacted to supplement and further effectuate the purposes of the A. A. A.; (c) that the debates show that Congress intended in Section 602½ to levy upon the foreign oils *the same processing tax* which the same Congress had previously authorized upon American farm products under A. A. A., and (d) that, consistent with that intent, Congress in effect adopted the Treasury Department's construction of "the first domestic processing" under A. A. A. when in Section 602½ Congress defined that phrase to mean "the first use in the United States in the manufacture or production of an article intended for sale."

In upholding the Treasury definition of "first domestic processing" the Court ignored the definition in the statute. It is not referred to in the opinion. It took no note of the double change which the Treasury definition made in the statutory definition—the deletion from the clause limiting the words "the first" of the phrase "in the manufacture or production of an article intended for sale" and the substitution therefor of the phrase "on or after the effective date of the Act" (*supra*, p. 10).

Unadvised with respect to any of these substantial matters the Court considered, *in vacuo* as it were, whether there were in the wording of the original Act any internal

indications that the Treasury Regulations "were a reasonable construction of the statutory language" and found that there were indications that it was reasonable though they were not "relied on for more than that" by the Court.

The first of the indications was this. The oil involved in that suit was coconut oil which had been refined in this country before May 10, 1934 in the production of refined oil for sale, and had been sold by the refiner to the Loose-Wiles Biscuit Company which after that date again used the oil in the manufacture of an article intended for sale, viz., as shortening in the manufacture of its bakery products. Referring to that oil the Court said:

> "• • • If any previous processing of it in this country which left it still coconut oil was to be treated as the first domestic processing to give it such a status as not to be capable of being subjected to a taxable processing as coconut oil, we think Congress would have said so, as it did in the same section with regard to mixtures."

The provision of Section 602½ with respect to mixtures to which the Court refers, is that the tax attaches to the first domestic processing of mixtures "where there has been no previous first domestic processing" of the contained oil.

What the Court is here saying is that the processing by Loose-Wiles Biscuit Company after May 10, 1934 is taxable because if Congress had intended that the "previous processing" of the oil by the refiner prior to May 10, 1934 which still left it coconut oil "was to be treated as the first domestic processing to give it such a status as not to be capable of being subjected to a taxable processing as coconut oil, we think Congress would have said so, as it did • • • with regard to mixtures." This statement can only be true if the Court *assumes* at the outset that "first" means first after May 10, 1934; because factually the processing by Loose-Wiles is the actual second domestic processing of the

oil; and such actual second domestic processing can only become "the first" in the sense that it is *the first* domestic processing of the oil *after May 10, 1934.* The Court is thus assuming the point it seeks to prove. Thus it is only if one assumes that "first" means first after May 10, 1934, that there would be any occasion to write into the statute an express provision exempting such second processing. If we apply the statutory definition of "first domestic processing," viz., "*the first* [earliest] use in the United States *in the manufacture or production* of an article intended for sale," it is clear that the processing by the refiner prior to May 10, 1934 was the earliest use in manufacture or production and accordingly was "the first domestic processing" of the oil. The processing by Loose-Wiles was the second domestic processing and was not taxable because the statute taxes only the *first* such processing. If we take the statutory definition there is no occasion for Congress to write into the statute an express provision exempting such second processing.

In other words, one can deduce from the absence of such an exemption from Section 602½ the conclusion that unmixed oils domestically processed before and after May 10, 1934 are taxable upon the later processing, only if one assumes to begin with that "first" means "first after the effective date of the Act," and that therefore some sort of an express exemption is necessary to give the processing after May 10 immunity.

But with respect to mixtures, the situation was different. The statute taxes "the first domestic processing" of a mixture, to use the Court's language, "only when in respect to any of the oils in the mixture there has been 'no previous first domestic processing.'" There might be a "first do-

mestic processing" of an unmixed oil followed by a "first domestic processing" of a mixture into which the oil had in the meantime been introduced. Accordingly, it made sense to provide that the tax should be levied on "the first domestic processing" of a mixture provided there has been no "previous first domestic processing" of the contained oil. But to say, if that is what the Court meant, that "the first domestic processing" of an unmixed oil is to be taxed provided there has been "no previous first domestic processing" of that oil would be meaningless. There can be but one "first domestic processing" of an unmixed oil—a second processing of that same oil could not be the first.

The Court states as another ground for thinking that the Treasury interpretation is reasonable that taxpayer's interpretation makes the phrase "previous first" redundant. We see no significant redundancy but only careful draftsmanship in the use of both words, however the language in question be construed; and we have already shown that the Treasury construction produces in the first exemption clause of the 1936 Amendment a clear redundancy for which there would be no explanation. That clause exempts fatty acids and salts "resulting from a previous first domestic processing *taxed under this section.*" Fatty acids and salts were newly added to the taxable articles by the 1936 Amendment. If "first" means "first after the effective date of the Act," "first domestic processing" would have to mean, with respect to fatty acids and salts, first after the effective date of the 1936 Amendment; and *every* first domestic processing of a fatty acid or a salt would thus be a processing "taxed under this section," and the phrase "previous first domestic processing *taxed under this section,*" under that construction, would be clearly redundant.

The final reason stated in the opinion for viewing the Treasury Regulation as reasonable was this. The Court held that the purpose of the provision that mixtures were to be taxed only "where there has been no previous first domestic processing of the contained oil" was to avoid double taxation; and that purpose was effectuated by construing "first" as meaning "first after the effective date of the Act." But the taxpayer's construction likewise effectuates that purpose. And opposed to the Court's deduction are all the substantial considerations which have been presented in this brief.

The Loose-Wiles opinion continues (p. 440):

> "• • • We do not, however, rely on that for more than to show that the Treasury regulations promulgated under the statute were a reasonable construction of the statutory language. But that, coupled with the fact that Congress amended section 602½ and re-enacted it as amended in section 702 of the Revenue Act of 1936, leaving the words 'first domestic processing' unchanged, does, we think, show congressional approval of the administrative interpretation of that phrase in the statute so persuasively that we should give it effect. Accordingly, we feel bound to hold the regulations valid."

The taxpayer in that case failed to present to the Court any analysis of the 1936 Amendment, failed to direct the Court's attention to the diverse language of the two exemption clauses, failed to point out the redundancy in the first exemption clause if the construction put upon the section by that Court is right, and failed to point out that the express language of the amendment (recognizing that there would be taxed and untaxed "previous first domestic processings") is wholly inconsistent with any idea of legislative approval of the Treasury Regulation, as we have shown above (*supra*, pp. 54-59).

As has been stated (*supra*, pp. 51-52), the Court below in the instant cases expressly rejected the contention that the 1936 Amendment showed approval by Congress of the Treasury Regulation.

POINT VII.

If there be any doubt as to the proper construction of Section 602½, the section must of course be strictly construed against the Government and all doubts resolved in favor of the taxpayer.

This principle is so well settled that we hesitate to cite cases to this Court. We have, however, collected some of the decisions which are particularly pertinent, in a footnote,[1] and will refer in the body of the brief to only one decision of this Court.[2]

It is noteworthy that all the Courts which have held with the Government on the question presented in the instant cases have expressed or indicated doubts, while all the Courts which have held for the taxpayer indicated no doubts whatever.

In the concluding paragraph of the opinion of the Court below it is stated (Rec. p. 37): "The question posed for our determination *is a difficult one*," and it is apparent from the shifts and changes in the opinions of the majority of the Court below that the question was "difficult" because the correct answer was doubtful.

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[1] *Gould* v. *Gould*, 245 U. S. 151, 153; *United States* v. *Merriam*, 263 U. S. 179, 187, 188; *Crooks* v. *Harrelson*, 282 U. S. 55, 61; *White* v. *Aronson*, 302 U. S. 16, 20; *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498, 508.

[2] *Miller* v. *Standard Nut Margarine Co.*, *infra*, p. 71.

The changes in the several opinions of the Court below to which we have called attention (*supra*, pp. 51, 52, 63) evidence more doubt than certainty.

In the other two cases in which the Government's contention has been sustained, viz., *Loose-Wiles Biscuit Co.* v. *Rasquin*, 95 F. (2d) 438 and *Tasty Baking Company* v. *United States*, 38 F. Supp. 844 (Ct. Cl. 1941), the Courts expressed or indicated doubts. In the *Loose-Wiles* case, *supra*, the Court said (p. 440):

> "* * * *Apart from the regulations*, we think the language of the statute *does leave it doubtful* whether Congress intended to tax a processing of the oils within the United States, which, though a first processing in point of time after the effective date of the statute, was not also the first in point of fact which had taken place in the country."

Likewise, in the majority opinion in the *Tasty Baking Co.* case, *supra*, Judge JONES said (p. 847):

> "If this issue were before us as a matter of first impression we *would have doubt* whether the Congress intended to tax oils in stocks that had previously been processed in the United States."

And again he said that the intention of Congress "is not *altogether clear, especially in the light of the Treasury Regulations* and the subsequent implied approval of the Congress" (p. 847).

On the other hand, the opinions in the cases which have sustained the taxpayers' contention, viz., *Durkee Famous Foods, Inc.* v. *Harrison*, *supra*, *Cincinnati Soap Company* v. *United States*, 22 F. Supp. 141 (D. C. Ohio—1938) and *Armour & Company* v. *Harrison* (D. C. Ill.—1937 C. C. H. Fed. Tax Service Vol. 4, Par. 9507) not officially reported, appeal dismissed, 95 F. (2d) 993, the Courts have declined to

let the promulgation of the Treasury Regulation create a doubt as to the proper interpretation of the statute and have held that the language of the statute on its face was clear and unambiguous.

Judge MARIS, for example to whom the phrase "first domestic processing" seemed "to be wholly free from ambiguity" (Rec. p. 44), concluded his dissenting opinion as follows (Rec. p. 46):

> "Consequently I think that the regulation is invalid and that its application violates the settled rule, to which, however, the courts too frequently pay only lip service, that ambiguities in a revenue statute must be construed strictly against the Government and that doubts therein must be resolved in favor of the taxpayer."

It seems to us that there is no room for doubt that "first" means "first" and not "first after the effective date of tax." If independently of the regulation one should ask the question when did the oils involved in these suits receive their first domestic processing, there could be but one answer —before May 10, 1934.

It is the regulation interpolating the words "on and after the effective date of the Act" which generated the doubts entertained by the Courts which have decided in favor of the Government, the doubt in each case *being as to the correctness of the regulation.* Such doubts are to be resolved in favor of the taxpayer.

A case in point, in which the facts are very similar to those of the instant cases, is *Miller* v. *Standard Nut Margarine Company,* 284 U. S. 498. In that case likewise the Commissioner endeavored to revise or amend a statute by issuing regulations extending its scope. The question was whether plaintiff's product came within the statutory definition of oleomargarine and was subject to the

tax of 10 cents per pound. The statute was amended in 1931 to include additional substances and the statutory definition of oleomargarine, as amended, included among the added substances "vegetable-oil annotto." The Commissioner issued regulations in which the quoted phrase appeared as "vegetable oil, annotto" thereby in effect extending the statutory definition of oleomargarine to include plaintiff's product. The Court held that the regulation was invalid, saying (p. 508):

> "Regulations promulgated under the Act omit the hyphen and add a comma thus making the phrase to read 'vegetable oil, annotto.' The Commissioner's determination that respondent's product is oleomargarine necessarily was based on that version. It is elementary that *tax laws are to be interpreted liberally in favor of taxpayers and that words defining things to be taxed may not be extended beyond their clear import. Doubts must be resolved against the Government and in favor of taxpayers.*"

In the cases at bar the Commissioner's attempted revision of the statutory language with the purpose of broadening the scope of the tax takes the form not of a change in the punctuation of the statutory language, but of an interpolation into the statutory definition of words not written there by Congress, viz., "on and after the effective date of the Act." Petitioner submits that the principle involved here is precisely the same as in the foregoing case and the decision in that case should have been controlling in the instant litigation. The majority of the Court in the *Durkee Famous Foods, Inc.*, case, *supra*, and Judge DRUFFEL in the *Cincinnati Soap Company* case, *supra*, specifically so held.

To petitioner the meaning of the phrase in controversy is not susceptible of any doubt. There is nothing in any of the other language employed in the statute that raises any

such doubt. There is nothing in the purpose and history of the statute that raises any such doubt. All of these substantiate petitioner's contention.

Conclusion.

It is respectfully submitted that the judgments of the United States Circuit Court of Appeals for the Third Circuit and of the United States District Court for the District of Delaware should be reversed and the cause should be ordered to be remanded to the United States District Court for the District of Delaware with instructions to enter a judgment in favor of the petitioner in accordance with the Stipulations of Facts (Par. 27, Rec. p. 15, and Par. 18, Rec. p. 24).

Respectfully submitted,

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APPENDIX.

I.—Revenue Act of 1934.

(Ch. 277, 48 Stat. 762, 763, 26 U. S. C. A. (1934 Ed.) Secs. 999a and 999.)

"Sec. 602. Tax on Certain Oils.

Section 601 (c) of the Revenue Act of 1932 is amended by adding at the end thereof a new paragraph as follows:

'(8) Whale oil (except sperm oil), fish oil (except cod oil, cod-liver oil, and halibut-liver oil), marine animal oil, and any combination or mixture containing a substantial quantity of any one or more of such oils, 3 cents per pound. The tax on the articles described in this paragraph shall apply only with respect to the importation of such articles *after the date of the enactment of the Revenue Act of 1934*,[1] and shall not be subject to the provisions of subsection (b) (4) of this section (prohibiting drawback) or section 629 (relating to expiration of taxes).'"

"Sec. 602½. Processing Tax on Certain Oils.

(a) There is hereby imposed upon *the first domestic processing* of coconut oil, sesame oil, palm oil, palm kernal (sic) oil, or sunflower oil, or of any combination or mixture containing a substantial quantity of any one or more of such oils with respect to any of which oils there has been no previous first domestic processing, a tax of 3 cents per pound, to be paid by the processor. There is hereby imposed (in addition to the tax imposed by the preceding sentence) a tax of 2 cents per pound, to be paid by the processor, upon the first domestic processing of coconut oil or of any combination or mixture containing a substantial quantity of coconut oil with respect to which oil there has been no revious first domestic

[1] Where italics are used, the emphasis is ours unless otherwise noted.

processing, except that the tax imposed by this sentence shall not apply when it is established, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, that such coconut oil (whether or not contained in such a combination or mixture), (A) is wholly the production of the Philippine Islands or any other possession of the United States, or (B) was produced wholly from materials the growth or production of the Philippine Islands or any other possession of the United States, or (C) was brought into the United States on or before the 30th day *after the date of the enactment of this Act* or produced from materials brought into the United States on or before the 30th day *after the date of enactment of this Act*, or (D) was purchased under a bona fide contract entered into prior to April 26, 1934, or produced from materials purchased under a bona fide contract entered into prior to April 26, 1934. All taxes collected under this section with respect to coconut oil wholly of Philippine production or produced from materials wholly of Philippine growth or production, shall be held as a separate fund and paid to the Treasury of the Philippine Islands, but if at any time the Philippine Government provides by any law for any subsidy to be paid to the producers of copra, coconut oil, or allied products, no further payments to the Philippine Treasury shall be made under this subsection. *For the purposes of this section the term 'first domestic processing' means the first use in the United States, in the manufacture or production of an article intended for sale*, of the article with respect to which the tax is imposed, but does not include the use of palm oil in the manufacture of tin plate.

* * *

Appendix

II.—Derivation of Language Used in Section 602½.

We quote below in parallel columns corresponding provisions of the Agricultural Adjustment Act, approved May 12, 1933 and Section 602½ approved May 10, 1934:

Agricultural Adjustment Act	Section 602½
"Sec. 9. * * * The processing tax shall be levied, assessed, and collected upon *the first domestic processing* of the commodity, whether of domestic production or imported, and shall be *paid by the processor.* * * *."	"(a) There is hereby imposed upon *the first domestic processing* of coconut oil, sesame oil, palm oil, palm kernel oil, or sunflower oil, or of any combination or mixture containing a substantial quantity of any one or more of such oils with respect to any of which oils there has been no previous first domestic processing, a tax of 3 cents per pound, to be *paid by the processor* * * *."
"Sec. 15 (e) During any period for which a processing tax is in effect with respect to any commodity there shall be levied, assessed, collected, and paid upon any article processed or manufactured wholly or in chief value from such commodity and imported into the United States or any possession thereof to which this title applies, from any foreign country or from any possession	(Section 602½ did not contain any provision for a compensating tax upon imports similar to the compensating tax of Section 15(e) printed opposite this paragraph. However, the idea for holding the tax upon Philippine coconut oil in a separate fund and paying the same over to the Philippine Islands undoubtedly came from the underscored portion of Section 15(e) of the A. A. A. as

of the United States to which this title does not apply, a *compensating tax* equal to the amount of the processing tax in effect with respect to domestic processing at the time of importation: *Provided, That all taxes collected under this subsection upon articles coming from the possessions of the United States to which this title does not apply shall not be covered into the general fund of the Treasury of the United States but shall be held as a separate fund and paid into the Treasury of the said possessions, respectively* • • •"

(Sec. 19(b) of the A. A. A. (*infra*, p. 81) by reference incorporates in A. A. A. the provisions of Sec. 626 of the Revenue Act of 1932, subdivisions (a) and (b) of which read as follows:)

"(a) Every person liable for any tax imposed by this title other than taxes on importation (except tax under section 615, relating to tax on soft drinks) shall make monthly returns under oath in duplicate and pay the taxes imposed by this title to the collector for the district in which is located his prin-

shown from the comparison below.)

"(a) • • • All taxes collected under this section with respect to coconut oil wholly of Philippine production or produced from materials wholly of Philippine growth or production, shall be held as a separate fund and paid to the Treasury of the Philippine Islands • • •"

"(b) Each processor required to pay the tax imposed by this section shall make monthly returns under oath in duplicate and pay the tax to the collector of internal revenue for the district in which is located his principal place of business, or if he has no principal place of business in the United States, then to

cipal place of business or, if he has no principal place of business in the United States, then to the collector at Baltimore, Maryland. Such returns shall contain such information and be made at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulations prescribe.

"(b) The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of 1 per centum a month from the time when the tax became due until paid."

"Sec. 17. (a) Upon the exportation to any foreign country (including the Philippine Islands, the Virgin Islands, American Samoa, and the island of Guam) of any product with respect to which a tax has been paid under this title, or of any product processed wholly or in chief value from a commodity with respect to which a tax has been paid under the collector of internal revenue at Baltimore, Maryland. Such returns shall contain such information and be made at such times and in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulations prescribe. The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of 1 per centum per month from the time the tax became due until paid."

"(d) Upon the exportation to any foreign country or to a possession of the United States of any article wholly or in chief value of an article with respect to the processing of which a tax has been paid under this section, the exporter thereof shall be entitled to a refund of the amount of such tax. Upon the giving of bond satisfactory to the Secretary for

this title, the exporter thereof shall be entitled at the time of exportation to a refund of the amount of such tax.

"(b) Upon the giving of bond satisfactory to the Secretary of the Treasury for the faithful observance of the provisions of this title requiring the payment of taxes, any person shall be entitled, without payment of the tax, to process for such exportation any commodity with respect to which a tax is imposed by this title, or to hold for such exportation any article processed wholly or in chief value therefrom."

"Sec. 18. (a) If (1) any processor, jobber, or wholesaler has, prior to the date a tax with respect to any commodity is first imposed under this title, made a bona fide contract of sale for delivery on or after such date, of any article processed wholly or in chief value from such commodity, and if (2) such contract does not permit the addition to the amount to be paid thereunder of the whole faithful observance of the provisions of this section requiring the payment of taxes, any person shall be entitled, without payment of the tax, to process for such exportation any article with respect to which a tax is imposed by this section."

"(e) If (1) any person has, prior to January 26, 1934, made a bona fide contract for the sale on or after the effective date of this section of any article wholly or in chief value of an article with respect to which a tax is imposed by this section or of any article with respect to which a tax is imposed by this subsection, and if (2) such contract does not permit the addition to the

of such tax, then (unless the contract prohibits such addition) the vendee shall pay so much of the tax as is not permitted to be added to the contract price.

"(b) Taxes payable by the vendee shall be paid to the vendor at the time the sale is consummated and shall be collected and paid to the United States by the vendor in the same manner as other taxes under this title. In case of failure or refusal by the vendee to pay such taxes to the vendor, the vendor shall report the facts to the Commissioner of Internal Revenue who shall cause collections of such taxes to be made from the vendee."

"Sec. 19. * * * (b) All provisions of law, including penalties, applicable with respect to the taxes imposed by section 600 of the Revenue Act of 1926, and the provisions of section 626 of the Revenue Act of 1932, shall, insofar as applicable and not inconsistent with the provisions of this title, be applicable in respect of taxes imposed by this title: * * *"

amount to be paid thereunder of the whole of such tax, then (unless the contract expressly prohibits such addition) the vendee shall pay so much of the tax as is not permitted to be added to the contract price. Taxes payable by the vendee shall be paid to the vendor at the time the sale is consummated and shall be returned and paid to the United States by the vendor in the same manner as other taxes under this secton. In case of failure or refusal by the vendee to pay such taxes to the vendor, the vendor shall report the facts to the Commissioner, who shall cause collection of such taxes to be made from the vendee."

"(f) All provisions of law (including penalties) applicable in respect of taxes imposed by section 600 of the Revenue Act of 1926, shall, insofar as applicable and not inconsistent with this section, be applicable in respect of the taxes imposed by this section."

III.—Additional Excerpts from the Congressional Debates on Section 602½ of the Revenue Act of 1934.

"The amount of this tax is equivalent to 200 percent on the current market price of coconut oil. No industry could bear that tax and survive, and it is very clear, from their statements before the House, that the proponents of this tax are not expecting revenue but are seeking only to prevent the importation of coconut oil. • • •

"Many members of this House have taken advantage of this debate to express themselves more or less vehemently *in favor of the total exclusion of coconut oil and are in favor of this tax as a means to that end.*" (Congresswoman Kahn—Cong. Rec. Vol. 78, p. 2785.)

"As every member knows, practically the entire amount of copra and coconut oil used in Continental United States comes from the Philippine Islands and the imposition of this so-called 'excise tax' is nothing more or less than the imposition of a *prohibitive tariff* on a people under the American flag. • • •

"Without equivocation, Mr. Chairman, I assert this excise tax to be nothing more or less than a prohibitive tariff, and I denounce it as such, for its competitive field with American commodities is so limited as to be utterly negligible. • • •" (Congressman Welch—Cong. Rec. Vol. 78, p. 2793.)

"• • • It is not understood why, *in this legislation*, we should seek to penalize the Philippines *by restricting their imports to this country in oils* while at the same time the administration is seeking to augment not only the exports of the Philippines, but of Cuba, as well, in sugar, which product is directly competitive to sugar production in this country." (Congressman Hoeppel—Cong. Rec. Vol. 78, p. 2930.)

"• • • Thus in the very law that launched the present agricultural program, *which proponents of the coconut-oil tax contend cannot succeed without restrictions on importations of that product* is found a specific protection for Philippine commodities." (Congresswoman Norton—Cong. Rec. Vol. 78, p. 3007.)

"I have been approached by people from my own state who were over here by the dozens saying they wanted this tax imposed *in order to keep Filipino products out of this country.* That is all that is behind it. There is not an ounce of revenue in it." (Senator Tydings—Cong. Rec. Vol. 78, p. 6312.)

"I am sure there are a good many Senators here who want to abide by the independence act, but, at the same time, *they desire to put a fair limitation on imports.*" (Senator Harrison—Cong. Rec, Vol. 78, p. 6314.)

"I believe some of this oil will be excluded, because the Senator knows that *whenever we put a duty* on any article there is a certain deterrent effect, and *to some extent it will lessen imports.*" (Senator Connally—Cong. Rec. Vol. 78, p. 6316.)

"The processing tax which was inserted in the bill by the House provided for a tax of 5 cents a pound upon coconut oil and copra. Its effect, if unmodified, would be *the same as though we had levied a tariff tax.*" (Senator Norris—Cong. Rec. Vol. 78, p. 6380.)

"This tax is intended on its face to be a prohibitive tax. It is not intended to raise revenue. It is not included in this bill for the purpose of raising

revenue. *It is for the purpose of establishing an embargo;* * * *." (Senator Clark—Cong. Rec. Vol. 78, p. 6393.)

"I make the motion because, to my mind, the inclusion in a so-called 'revenue bill' of provisions which are not intended to raise revenue, *but contemplate an embargo,* is a most dishonest and most vicious system of legislating." (Senator Clark—Cong. Rec. Vol. 78, p. 6395.)

"*The purpose of this action is to exclude Filipino products,* not to raise revenue. * * *

"Even so, if this were a revenue tax, we might justify it on some vague ground; but this is a tariff tax and nothing else, *put on to exclude an article which we do not produce in the United States.*" (Senator Tydings—Cong. Rec. Vol. 78, p. 7976.)

IV.—House Conference Report No. 1385, Revenue Act of 1934, explains the changes made by the Conferees in Sections 602 and 602½ as follows (p. 29):

"Amendment no. 153: The House bill imposed a tax of 5 cents per pound on the first domestic processing (*defined as the first use in commercial manufacture or production*) of coconut oil, sesame oil, or combinations or mixtures brought into the United States in chief value of either or both such oils.

"This amendment reduces the rate of tax to 3 cents per pound. It also adds palm oil, palm-kernel oil, sunflower oil, perilla oil, imported whale oil, imported fish oil (except cod and cod-liver oil), and imported marine-animal oil to the taxable oils and taxes

combinations of the oils enumerated in the section and mixtures containing substantial quantities of any one or more of such oils. Palm oil used in the manufacture of tin plate is exempted from the tax. All taxes collected under the subsection on products of the Philippines are to be held as a separate fund and paid into the treasury of the Philippines, but this provision is to be inoperative if the Philippine Government by any law provides for any subsidy to be paid to producers of copra, coconut oil or allied products.

"The House recedes with an amendment which (1) taxes the oils enumerated in the Senate amendment, except sperm oil, perilla oil, and halibut liver oil; (2) taxes combinations or mixtures containing substantial quantities of taxable oils with respect to which there has been no previous first domestic processing; (3) retains the rate of 3 cents per pound on all the articles taxable, except that an additional tax of 2 cents (making a total of 5 cents) per pound is imposed on coconut oil (and combinations or mixtures containing substantial quantities of coconut oil) unless the oil is the product of the Philippines or other possessions or produced from materials from the Philippines or other possessions, or was in the United States on or before the 30th day after the enactment of the act or produced from materials in the United States on or before the same day, or was contracted for, or produced from materials contracted for, before April 26, 1934; (4) *changes the point of imposition of the tax* in the case of imported whale oil, imported fish oil, and imported marine animal oil to the *importation* instead of *the first domestic processing;* and (5) provides for payment to the Philippine treasury of taxes collected on coconut oil, and mixtures containing coconut oil of Philippine origin or produced from Philippine materials."

V.—Agricultural Adjustment Act, Sections 9(a), 15(e), and 16, approved May 12, 1933, 48 Stat. 31, p. 35 *et seq.*:

"Processing Tax

"Sec. 9. (a) To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. *The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity,* whether of domestic production or imported, *and shall be paid by the processor.* The rate of tax shall conform to the requirements of subsection (b). Such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements. The processing tax shall terminate at the end of the marketing year current at the time the Secretary proclaims that rental or benefit payments are to be discontinued with respect to such commodity. The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture: *Provided,* That upon any article upon which a manufacturers' sales tax is levied under the authority of the Revenue Act of 1932 and which manufacturers' sales tax is computed on the basis of

weight, such manufacturers' sales tax shall be computed on the basis of the weight of said finished article less the weight of the processed cotton contained therein on which a processing tax has been paid.

* * *

"Supplementary Revenue Provisions

"Sec. 15. * * *

(e) During any period for which a processing tax is in effect with respect to any commodity there shall be levied, assessed, collected, and paid upon any article processed or manufactured wholly or in chief value from such commodity and imported into the United States or any possession thereof to which this title applies, from any foreign country or from any possession of the United States to which this title does not apply, a compensating tax equal to the amount of the processing tax in effect with respect to domestic processing at the time of importation: *Provided,* That all taxes collected under this subsection upon articles coming from the possessions of the United States to which this title does not apply shall not be covered into the general fund of the Treasury of the United States but shall be held as a separate fund and paid into the Treasury of the said possessions, respectively, to be used and expended by the governments thereof for the benefit of agriculture. Such tax shall be paid prior to the release of the article from customs custody or control."

"Floor Stocks

"Sec. 16. (a) Upon the sale or other disposition of any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied, that on the date the tax first takes effect or wholly terminates with respect to the commodity, is held for sale or other disposition (includ-

ing articles in transit) by any person, there shall be made a tax adjustment as follows:

(1) *Whenever the processing tax first takes effect, there shall be levied, assessed, and collected a tax to be paid* by such person *equivalent to the amount of the processing tax which would be payable with respect to the commodity from which processed if the processing had occurred on such date.*

(2) Whenever the processing tax is wholly terminated, there shall be refunded to such person a sum (or if it has not been paid, the tax shall be abated) in an amount equivalent to the processing tax with respect to the commodity from which processed.

(b) The tax imposed by subsection (a) shall not apply to the retail stocks of persons engaged in retail trade, held at the date the processing tax first takes effect; but such retail stocks shall not be deemed to include stocks held in a warehouse on such date, or such portion of other stocks held on such date as are not sold or otherwise disposed of within thirty days thereafter. The tax refund or abatement provided in subsection (a) shall not apply to the retail stocks of persons engaged in retail trade, held on the date the processing tax is wholly terminated."

VI.—Treasury Regulations under the Agricultural Adjustment Act construing "the first domestic processing."

Article 7 of Regulations 81, approved July 12, 1933, as originally promulgated under the Agricultural Adjustment Act, reads as follows:

"Art. 7. When tax attaches.—The tax attaches upon the first domestic processing of the commodity. Where some part of the first domestic processing of a particular quantity of the commodity takes place

during the period when a tax is in effect, the tax attaches, notwithstanding that some portion of the first domestic processing of such quantity takes place before or after such period."

Thereafter, on September 20, 1933, by T. D. 4392, Article 7 of Regulations 81 was amended to read (C. B. XII-2, p. 430):

"Art. 7. When tax attaches.—The tax attaches *at the beginning* of the first domestic processing of the commodity. When the first domestic processing *begins before the effective date, no tax attaches,* although it is not completed until after the effective date. When the first domestic processing begins while the tax is in effect, it is subject to the processing tax, notwithstanding it is not completed until after the tax is terminated."

Article 7 of Regulations 81 was further amended by T. D. 4403, approved November 2, 1933, to be effective retroactively to July 9, 1933, and to read in its *final form as follows* (C. B. XII-2, p. 430):

"Art. 7. When tax attaches.—The tax is imposed upon *the first domestic processing,* and is measured by the amount of the commodity put into such processing. The tax attaches to a particular quantity of the commodity (1) *if it is in process on the effective date, provided the first domestic processing has not been completed prior to that date,* or (2) if the first domestic processing is begun during the period while the tax is in effect, provided it is completed before the termination of the tax. Where the first domestic processing of a particular quantity of the commodity is completed prior to the effective date, but on the effective date such quantity is in secondary processing, it is subject to the tax on floor stocks (see Regulations 82)."